80-607

No. .....

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1980

STATE OF MISSOURI,
Respondent,

vs.

MARK E. SAGER,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

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QUESTIONS PRESENTED

Whether the trial Court erred as a matter of law and to the prejudice of Mark E. Sager in failing to grant his Motion to Suppress Evidence, presented in writing prior to trial and renewed during the course of the trial, with reference to certain oral statements allegedly made by Mark E. Sager on October 1, 1977 and October 5, 1977 to Officers Clarence Luther and Fred Mills and on October 2, 1977 to Officer Deister and whether the trial Court committed further trial error by allowing the State, over Petitioner's objection to use said statements in cross-examination and rebuttal. All of said alleged statements were in violation of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Whether the trial Court erred as a matter of law and to the prejudice of Mark E. Sager by refusing to grant Petitioner's Motion to Dismiss filed after jury sworn and before evidence presented; said allegations in said Motion were thereafter preserved in Petitioner's Motion for New Trial duly filed on July 10, 1978 in the following particulars, to-wit: Attached as Appendix E (Tr. Vol. 7 - page 2135).

Said action of the trial Court denied the Petitioner his rights under the Constitution of the United States, Amendments IV, V, VI, VIII and XIV.

PARTIES

All parties to this proceeding are set forth in the caption.

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No. .....

In the Supreme Court of the United States

October Term, 1980

STATE OF MISSOURI,
Respondent,

vs.

MARK E. SAGER,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

The Petitioner, Mark E. Sager, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Missouri Court of Appeals, Western District, entered in these proceedings on May 5, 1980 and Motion for Rehearing and/or Transfer to the Supreme Court of the State of Missouri denied June 9, 1980; and the denial of the Application to Transfer to the Supreme Court of the State of Missouri dated July 15, 1980.

OPINIONS BELOW

The Opinion of the Missouri Court of Appeals, Western District, Cause No. 30,389, is attached hereto as Appendix "A" and the Motion for Rehearing and/or Transfer to Supreme Court is attached hereto as Appendix "B" and the denial of the Supreme Court for Transfer, Cause No. 62292, is attached hereto as Appendix "C".

JURISDICTION

The judgment of the Missouri Court of Appeals, entered on May 5, 1980, affirmed the conviction of the trial Court wherein Petitioner was convicted of the crime of manslaughter. Motion for Rehearing and/or Transfer to the Supreme Court of the State of Missouri was denied on June 9, 1980. Application for Transfer to the Supreme Court of the State of Missouri was denied on July 15, 1980. This petition is filed within the applicable time thereafter and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (3) and the applicable Supreme Court Rules of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendments IV, V, VI, VIII and XIV

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put

in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The Petitioner was indicted on October 25, 1977 in Platte County, Missouri, and charged with the crime of capital murder of one Julie Wittmeyer, occurring on September 2, 1977.

The Petitioner at the time of his arrest on October 1, 1977, was seventeen years of age and a senior at Platte County High School. He was arrested by Officer Luther and Officer Mills and taken to the Platte County jail at Platte City, Missouri. He allegedly was advised orally of his constitutional rights and shown a copy of his constitutional rights which he did not sign. Officer Luther continued to interrogate the Petitioner contending that he believed the Petitioner to understand his rights and at a point in the interrogation allegedly Petitioner, Mark E. Sager, said: "If you will get my Dad in here, I will tell you how Julie was killed". This statement was vehemently denied by the Petitioner in the trial of the case (Tr. Vol. 7 - page 1837).

The Petitioner talked with counsel, Roy W. Brown, and his father, Ed Sager, at approximately 7 P.M. on October 1, 1977, and counsel advised the officers in charge that there should be no further interrogation of the Petitioner without the attorney's presence.

The Petitioner was transferred to another county for safekeeping on October 2, 1977 by Officer Deister of the Platte County Sheriff's Office who allegedly orally advised the Petitioner of his constitutional rights and asked him if he wanted to talk further about the statement he had started the day before. Officer Deister, claiming that he did not understand that Petitioner, Mark E. Sager, had any attorney, continued to interrogate the Petitioner en route to Lexington, Missouri. Said oral statement was

suppressed by the Court for use by the State in its case in chief.

The Petitioner was arraigned on October 3, 1977 and counsel appeared with the Petitioner for said preliminary arraignment.

On October 5, 1977 Officer Fred Mills and Officer Clarence Luther proceeded to Lexington, Missouri county jail, again allegedly advising the Petitioner of his rights, pursuant to Miranda, and proceeded to question him. Both officers denied that they understood that the Petitioner had engaged counsel. However, they admitted that they were directed to interrogate Petitioner by the officer in charge of the Metro Squad, Officer Clarence Beeler (Tr. Vol. 1 - page 131). It developed in deposition and also in the trial of the case that Officer Beeler had been advised that there should be no interrogation of the Petitioner without the presence of his lawyer. This admonition was ignored. This statement was suppressed by the Court for use by the State in its case in chief. Petitioner, at no time (October 2 and October 5, 1977), admitted that he was involved in the killing of Julie Wittmeyer.

The testimony in the trial consists of approximately 2,200 pages of the trial proper and in addition thereto hundreds of pages of depositions and exhibits that were considered by the Court not only on the pre-trial Motions but also in the trial of the case proper. All of the allegations in Question Two were substantially supported by depositions and the record. One of the most flagrant violations being that the Petitioner was sent to the Fulton State Hospital for a mental examination, over the objection of Petitioner's attorney (Tr. Vol. 1 - pages 11-18) namely for the reason that during that period of time, approximately ninety days, the Petitioner's counsel was unavailable to him. More specifically, the trial Court,

on December 16, 1977 (Tr. Vol. 1 - pages 19-42) ordered that Petitioner's counsel could not be present during interviews at the State Hospital. The Petitioner at no time showed any indication of any lack of mental competency, in fact, to the contrary, advised the Court, at every opportunity, that under no circumstances would there ever be a plea of insanity or lack of competency.

The State in violation of the Court Order given by Judge Yeaman, the trial Court in Platte County, Missouri, on December 13, 1977, wherein the State's attorney was directed to keep Petitioner's counsel advised of all reports and expert opinions that he had available or would have available in the future, withheld a letter and/or report from Petitioner's counsel which Petitioner believes was quite important to his defense. Said letter is set out as follows:

13 Oct. 1977
Re: Case #50621

Dear Sheriff Thomas:

Enclosed are two copies of my initial dental report on the bite mark photographs and the models. With twenty one points of comparison I am of the professional opinion, with reasonable medical certainty, that the teeth of Mark Sager made the bite mark on the right breast of Julie Whittmeyer. I will continue to do more research on this case.

Sincerely,

/s/ Lester L. Luntz, D.D.S.

Petitioner duly filed his Motions for Discovery pursuant to the applicable Statutes and Supreme Court Rules of the State of Missouri and also filed a Motion to Suppress Evidence and a Motion to Dismiss hereinafter set out as Appendix E prior to the trial of this cause.

The Motion to Dismiss was overruled on May 23, 1978. The Motion to Suppress the oral statement allegedly given on October 1, 1977 was overruled by the Court on May 16, 1978 (Tr. Vol. 2 - page 433).

The Court on May 16, 1978 sustained the Motion to Suppress the oral statement allegedly given on October 5, 1977 for its use by the State in its case in chief (Tr. Vol. 2 - page 433).

On May 25, 1978 the Court sustained Petitioner's Motion to Suppress the oral statement allegedly given on October 2, 1977 for its use by the State in its case in chief for the reason that said taking of the statement was in violation of Petitioner's right to counsel (Tr. Vol. 4 - page 1019).

Petitioner took the stand and testified in his own behalf setting forth an alibi defense (Tr. Vol. 6 - pages 1828-1838). Said alibi was fully corroborated by eleven witnesses (Tr. Vol. 5 - pages 1531 to 1631 and Vol. 6 - pages 1672-1684).

At the close of the direct evidence of the Petitioner, the State was permitted to cross-exam the Petitioner with reference to the oral statements given on October 2, 1977 and October 5, 1977, over the objection of Petitioner (Tr. Vol. 6 - page 1845).

The Court, over the objection of Petitioner, permitted the State to recall Officers Luther, Mills and Deister and place the entire oral statements (October 2, 1977 and October 5, 1977) into evidence by way of rebuttal (Tr. Vol. 7 - pages 1891-1930).

After presentation of all evidence and arguments of counsel, the jury returned a verdict on June 1, 1978 convicting the Petitioner of the crime of manslaughter.

The Court then reconvened the jury and instructed them as to the penalty for manslaughter. The jury refused to assess a penalty thus leaving the responsibility of assessing the penalty to the Court who on August 7, 1978 (Tr. Vol. 7 - page 2164) assessed the Petitioner's sentence at the maximum of ten years in the Department of Corrections of the State of Missouri.

Petitioner duly filed his Motions for New Trial and Judgment of Acquittal, same being overruled. Petitioner then perfected his appeal to the Missouri Court of Appeals, Western District preserving the points raised in this Petition for Writ of Certiorari, in his Motion for New Trial and Petitioner's Brief. The conviction for manslaughter was affirmed by the Missouri Court of Appeals, Western District, Appendix A.

Motion to Transfer to the Supreme Court of the State of Missouri was overruled and Petitioner is now in the custody of the Department of Corrections of the State of Missouri serving his sentence.

REASONS FOR GRANTING WRIT

Counsel for Petitioner respectfully submits that this is a case wherein a Defendant has been wrongfully convicted of a crime which he did not commit and that the jury was misled by the actions of the trial Court in failing to suppress the statements referred to in the Statement of Facts and attached as an Appendix hereto. The statements are not inculpatory but are very capable of two interpretations. Coupled with the expert's testimony and the seriousness of the crime, it is contended by the Petitioner that the jury was misled and compromised their verdict. Certainly if one were to read the testimony as to the death of the victim involved there is no room

for doubt that the crime committed was capital murder and not that of manslaughter. The Petitioner is either guilty of capital murder or nothing. The jury by their verdict found the Petitioner not guilty of capital murder, first degree murder, or second degree murder indicating again that the verdict was a matter of compromise.

Petitioner submits that the most damaging trial error occurred when the trial Court refused to suppress all of the alleged oral statements given by Petitioner on October 1, 1977, October 2, 1977 and October 5, 1977. The actions of the police officers were in direct contravention of Petitioner's constitutional rights under Amendments IV and V of the U.S. Constitution and against the dictates of *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Petitioner further submits that the continuing interrogation by Officer Deister, Officer Mills and Officer Luther, after knowledge that the Petitioner had hired an attorney, is the worst violation of Petitioner's rights that could occur in the United States, keeping in mind that this Petitioner was barely seventeen years old and charged with the most serious crime that can occur in the United States, i.e., capital murder. The error was especially prejudicial to this Petitioner.

The action of the trial Court was particularly prejudicial to Petitioner in permitting the State to cross-examine the Petitioner with reference to the statements given on October 2, 1977 and October 5, 1977 and further compounded the error by permitting the State to present the statements in rebuttal at the close of the case, over the objection of Petitioner, unduly pointed up the poison of the statements. Said statements are contrary to *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) wherein the Court said, l.c. 647:

> "The Court was careful, however, to distinguish the situation of an accused whose testimony, as in the instant case, was a 'denial of complicity in the crimes of which he was charged,' that is, where illegally obtained evidence was used to impeach the accused's direct testimony on matters directly related to the case against him. As to that situation, the Court said: 'Of course, the Constitution guarantees a defendant the fullest opportunity to meet the accusation against him. He must be free to deny all the elements of the case against him without thereby giving leave to the Government to introduce by way of rebuttal evidence illegally secured by it, and therefore not available for its case in chief'. Walder v. U.S., 348 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954)."

In a very recent Federal case, the Court of Appeals in *U.S. v. Havens,* 592 F.2d 848 (1979), l.c. 851 stated that:

> "From the Agnello-Walder framework, two requirements emerge that bear on the admissibility of the otherwise illegal evidence received against Havens. First, the predicate for its use in impeachment must be found in *in the direct examination of the defendant.* It cannot be smuggled into evidence by the prosecutor on cross-examination. Second, the evidence in question must contradict a particular statement made by the defendant. An arguable conflict with a simple denial of guilt does not meet this test." (Emphasis ours).

In the instant case the Petitioner took the stand and denied guilt. At no time during direct examination did the Petitioner refer to or deny any of the statements made on October 2, 1977 and October 5, 1977.

The Missouri Court of Appeals totally ignored the holdings of the above-quoted U.S. Supreme Court cases.

Petitioner was greatly hampered in his preparations for his defense by the acts of the prosecutor, as set out in the Motion to Dismiss, after the jury was sworn, preserved as part of the Motion for Judgment of Acquittal and in the Alternative to Grant a New Trial.

CONCLUSION

Wherefore, Petitioner, for reasons set out heretofore, respectfully prays this Court to issue its Writ of Certiorari for the purpose of reviewing the judgment of the Supreme Court of the State of Missouri.

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Attorneys for Petitioner, Mark E. Sager

APPENDIX

APPENDIX A

STATE of Missouri, Respondent,

v.

Mark E. SAGER, Appellant.

No. KCD 30389.

Missouri Court of Appeals,
Western District.

May 5, 1980.

Motion for Rehearing and/or Transfer to
Supreme Court Denied June 9, 1980.
Application to Transfer Denied

July 15, 1980.

Defendant was convicted in the Division No. 2 Circuit Court, Boone County, Frank Conley, J., of manslaughter, and he appealed. The Court of Appeals, Manford, J., held that: (1) trial court did not err in overruling defendant's motion to suppress evidence of alleged oral statement or in permitting defendant to be cross-examined about alleged oral statement taken after his arrest; (2) trial court properly admitted evidence as to who placed bite mark upon body of deceased; (3) there was no error in giving instruction on manslaughter, despite objection that instruction failed to inform jury of particular time of death; and (4) evidence supported instruction on manslaughter.

Affirmed.

1. Criminal Law (Key) 412.1(2)

Where defendant, a high school senior at time of his arrest for murder of 14 year-old-girl, was warned he was prime suspect and was afforded *Miranda* warning, where defendant was under no mental or educational handicap which prevented his voluntary waiver of right to remain silent, to be afforded counsel, to know any incriminating statement could be used against him and that he could have terminated the interview at any time, and where there was no compulsion and no incommunicado interrogation in police-dominated surroundings without full warnings of constitutional rights, oral statement taken at time of defendant's arrest could be admissible in State's case-in-chief. U.S.C.A.Const. Amends. 4, 14.

2. Criminal Law (Key) 414

State, in prosecution for murder, failed to carry burden of proof that law enforcement officers who questioned defendant while in custody did not know defendant was represented by counsel and, thus, trial court properly suppressed pertinent statements from State's case-in-chief. U.S.C.A.Const. Amends. 4, 14.

3. Criminal Law (Key) 412.2(3)

Miranda v. Arizona properly insures to an accused the constitutional protection against use of involuntary statements made while in custody as part of State's case-in-chief; however, such statements might well be utilized in other fashion during course of trial. U.S.C.A.Const. Amends. 4, 14.

4. Witnesses (Key) 388(2), 390

Criteria which must be followed when using statements by way of impeachment and rebuttal are that such

statements must be shown to be voluntary and it must be shown that use of such statements must rest upon the laying of a proper foundation. U.S.C.A.Const. Amends. 4, 14.

5. Criminal Law (Key) 412.2(3), 517.2(3)

The safeguards of *Miranda v. Arizona* and other federal and state decisions do not equate with complete prohibition against use of statements or confessions at other stages of trial proceeding. U.S.C.A.Const. Amends. 4, 14.

6. Witnesses (Key) 388(10)

Prior statements cannot be used unless witness is first asked if he made the statement; attention of the witness must be called to the time, place, circumstances and person to whom statement was made; and in order to show by other witnesses prior inconsistent statements of an accused, a foundation must be laid by interrogating witnesses concerning alleged inconsistent statements.

7. Witnesses (Key) 390

Where statements made by defendant after initial interview were voluntary and defendant was advised of *Miranda* warning and yet engaged officers in conversation about the case and at no time did he insist upon his right to remain silent or to have counsel present, use of statements for cross-examination and as rebuttal testimony was proper for purposes of impeachment upon prior inconsistent statements.

8. Criminal Law (Key) 478(1)

In prosecution for murder, evidence did establish qualifications of state's witnesses as experts, enabling them to render an expert opinion as to the person who placed bite mark on breast of victim.

9. Criminal Law (Key) 486

Factual basis which served as basis for expert's opinion as to person who placed bite mark on breast of homicide victim was supported by reliable and credible evidence.

10. Criminal Law (Key) 481, 1153(2)

Determination of admissibility of expert testimony rests largely in discretion of trial court, and exercise of that discretion will not be disturbed on appeal unless an abuse of such discretion is shown.

11. Criminal Law (Key) 339.6

Science of bite mark identification has developed to such a degree as to its reliability and credibility as to permit its use as evidence in criminal proceeding.

12. Criminal Law (Key) 472

In prosecution for murder, trial court did not err in admitting scientific and expert evidence consisting of expert opinions about issue of identity of perpetrator of bite mark on victim's body.

13. Criminal Law (Key) 772(4)

Although specific time need not be included in jury instructions offered in prosecution for homicide, instructions may be required to include a finding as to time of act causing death if time is of decisive importance even though not the essence of the offense.

14. Criminal Law (Key) 772(4)

Where evidence before jury in murder prosecution clearly contrasted the time of offense and alibi defense of defendant and it was not a case where jury could believe defendant was where his alibi defense and cor-

roborating witnesses placed him and still believe the defendant committed the crime, instruction to effect that if you find from the evidence that on or about the second day of September, 1977, defendant caused death of victim, then you will find defendant guilty of manslaughter, which did not state, with particularity, time of death of victim, did not nullify alibi defense nor place an impossible burden upon defendant to offer evidence of his alibi defense.

15. Homicide (Key) 282

Although evidence was sufficient to sustain conviction for capital murder, it was also sufficient to sustain conviction for manslaughter and jury was not bound to make finding upon capital murder exclusively.

16. Criminal Law (Key) 1028

Defendant's claim that trial court erred as matter of law in failing to grant him a new trial, which argument was attempted generalized preservation of all points of error assigned in defendant's motion for new trial, was without merit upon defendant's failure to properly preserve any point or points for review, plus the complete absence of any argument in support of such allegation.

17. Criminal Law (Key) 1178

On appeal, reviewing court does not review points raised in motion for new trial, which are neither briefed nor argued, and when defendant fails to brief or argue any such point, such point is deemed to be waived.

18. Criminal Law (Key) 1144

Appellate court cannot assume facts or evidence not found upon the record, and it cannot assume facts presented as mere allegations on appeal.

19. Criminal Law (Key) 1115(1)

Defendant's claim concerning report of doctor and alleged refusal or failure of prosecution to comply with trial court's order for discovery regarding this report had no evidentiary support upon record and was without merit.

20. Criminal Law (Key) 1030(1)

A determination of plain error is predicated upon manifest injustice or miscarriage of justice, resulting in prejudice to accused. V.A.M.R. Crim. Rule 27.20.

Roy W. Brown and James R. Brown of Brown & Brown, Kansas City, for appellant.

John Ashcroft, Atty. Gen., Jefferson City, Earl W. Brown, III, Kansas City, for respondent.

Before TURNAGE, P. J., and SHANGLER and MANFORD, JJ.

MANFORD, Judge.

This is a direct appeal from a jury conviction for manslaughter. The trial court affixed punishment at ten years in the Missouri Department of Corrections. The judgment is affirmed.

On this appeal, the court is faced with five alleged points of error, which in summary are as follows: (1) the trial court erred as a matter of law in overruling appellant's motion to suppress evidence of an alleged oral statement of October 1, 1977 and further, in permitting appellant to be cross-examined about alleged oral statements of October 2 and October 5, 1977, and the further use of said statements, because all of said statements were obtained in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); (2) the trial court

erred as a matter of law by allowing opinion evidence as to who placed a bite mark upon the body of the deceased because [a] bite mark identification has not reached the point of scientific reliability and credibility to permit the use thereof as evidence in criminal trials, [b] the state's witnesses were not sufficiently qualified as experts in the field to permit of their rendering an opinion as to the identity of the perpetrator of the bite mark and [c] the factual basis for such opinion was not supported by reliable and credible evidence; (3) the trial court erred as a matter of law in giving instruction No. 8 (MAI-CR 15.18—Manslaughter) because this instruction failed to inform the jury with the particular time of death (3:30-5:00 p.m.), allowing the jury to find appellant guilty without proof of the death of the victim during the time specified; (4) the trial court erred as a matter of law in giving instruction No. 8 (MAI-CR 15.18—Manslaughter) because there was no evidence to support said instruction, and the credible evidence fails to support a finding of guilty for manslaughter, and the court erred in not granting appellant's motion for acquittal notwithstanding the verdict; and as his final alleged error (5) appellant contends the trial court erred as a matter of law in denying him a new trial for the reason that the cumulative and prejudicial denial of due process resulted from the deliberate failure of the prosecutor to timely fully disclose the evidence ordered disclosed by the trial court and other complaints more fully set out in appellant's motion for new trial contrary to the Mo.Const. Art. I, §§ 10, 12, 14, 15, 16, 17, 18(a), 19, 20 and 21 and the U.S.Const. Amends. IV, V, VI, VII and XIV.

At approximately 3:20 p. m. on September 2, 1977, 14 year-old Julie Wittmeyer got off the Platte RIII school bus. The bus had stopped at its regular stop on HH Highway, which was at the entrance to the roadway leading

to the Wittmeyer farm. A passing motorist observed Julie leave the school bus and proceed to her family's mailbox. Between 5:30 and 6:00 p. m. on this same date, Julie's father called the bus driver, only to learn Julie had gotten off the bus earlier in the day.

The father, accompanied by his son, commenced to search for Julie. As the two had covered a distance "pretty well down" the 3,161 foot driveway, the son discovered personal items belonging to Julie. These items consisted of a pair of brown shoes, part of a brown shirt, a pair of tan slacks, a blue notebook and an algebra book. These items were in an asparagus patch adjacent to the driveway, and within an area approximately 4 feet by 8 feet consisting of vegetation. This area of vegetation was matted down, indicating signs of a struggle.

The Platte County Sheriff was then contacted, and an intensive search commenced, which continued until about 1:30 a. m. the following morning. Rain temporarily interrupted the search. On the afternoon of September 3, 1977, part of a blouse and a bra were found and an evidence technician was sent to the scene to photograph these items. The search continued, involving some 200 to 300 persons, both law enforcement officials and volunteers. On September 4, 1977, a local citizen was searching the area on horseback and discovered a body. Law enforcement officials were notified, and the body was identified as that of Julie Wittmeyer. The following are scaled drawings, depicting the area, the location of personal effects and body of the victim.[1]

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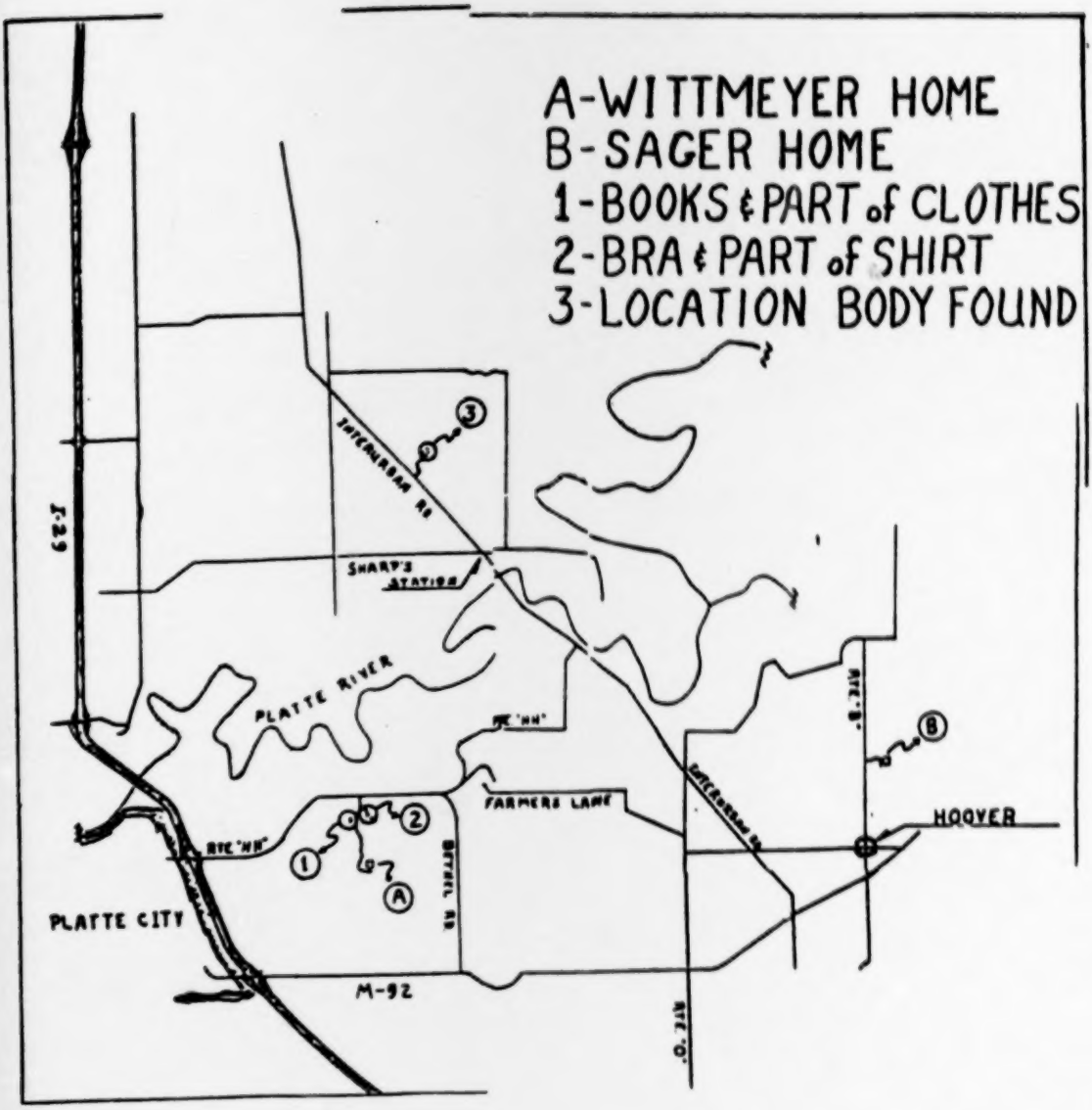
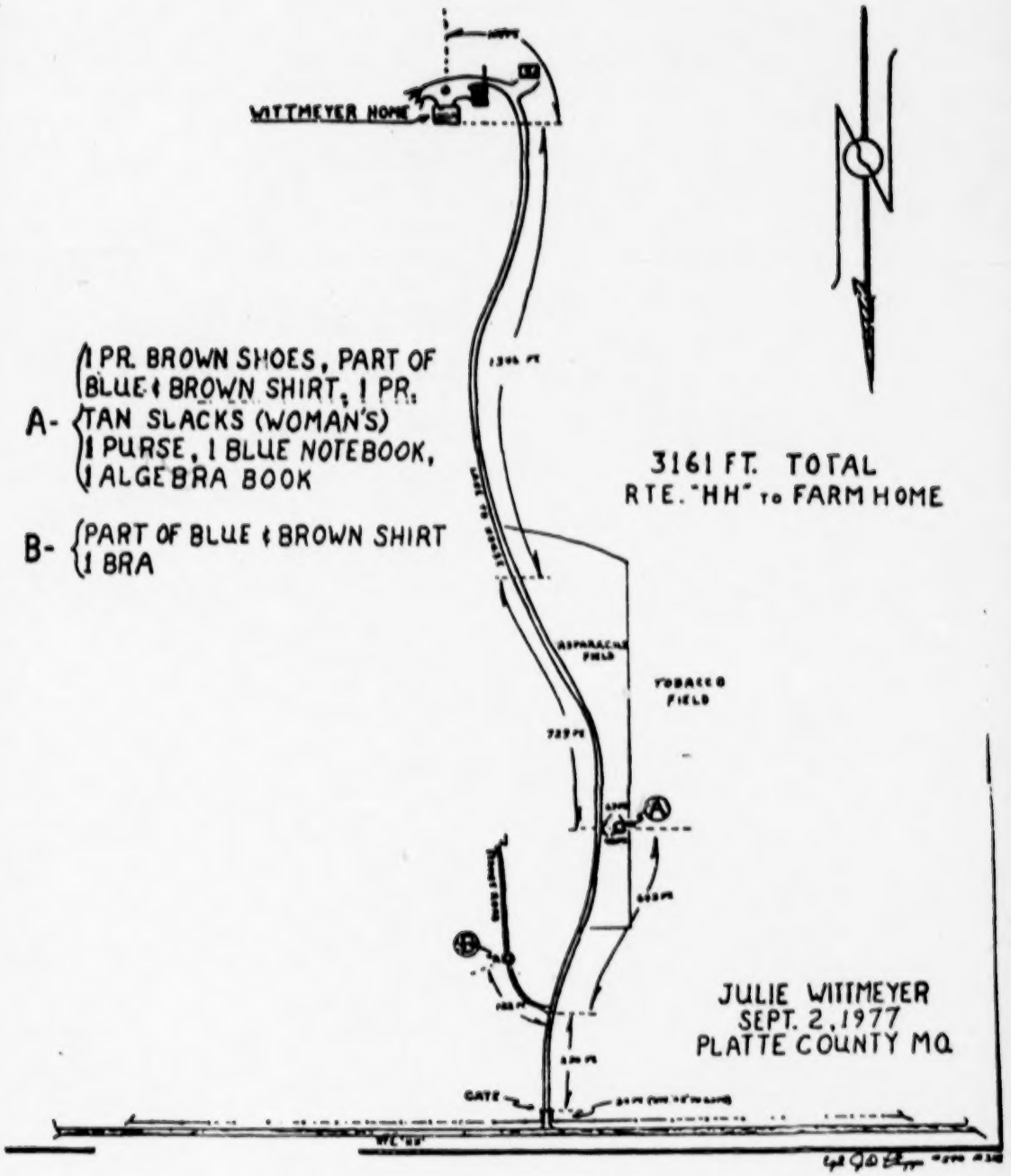
1. Taken from state's exhibit nos. 2 & 3. It was developed that these exhibits and defense exhibits nos. 2 & 3 were comparable.


A-WITTMEYER HOME
B-SAGER HOME
1-BOOKS & PART of CLOTHES
2-BRA & PART of SHIRT
3-LOCATION BODY FOUND
I-29
SHARP'S STATION
PLATTE RIVER
RTE "HH"
FARMERS LANE
BETHEL RD
HOOVER
PLATTE CITY
M-92
RTE "O"


WITTMEYER HOME
A- 1 PR. BROWN SHOES, PART OF BLUE & BROWN SHIRT, 1 PR. TAN SLACKS (WOMAN'S) 1 PURSE, 1 BLUE NOTEBOOK, 1 ALGEBRA BOOK
B- PART OF BLUE & BROWN SHIRT 1 BRA
3161 FT. TOTAL
RTE. "HH" TO FARM HOME
ASPARAGUS FIELD
TOBACCO FIELD
JULIE WITTMEYER
SEPT. 2, 1977
PLATTE COUNTY MO.
GATE

At about 1:30 p. m. on September 4, 1977, an autopsy was performed. The autopsy revealed a three-centimeter[2] abraded laceration to the forehead. This would was described as being compatible with a blunt traumatic blow to the forehead. There was a one-centimeter laceration along the vermillion border of the upper lip, with teeth marks on the opposing side interiorly. The autopsy also revealed multiple lacerations, both superficial and penetrating and both external and internal to the neck and throat; multiple lacerations to the super clavicular; laceration to the mandibular angle extending laterally to a point just below the left ear lobe; laceration to the neck with penetration extending to the vertebral column; laceration to the left shoulder region; a bruise overlying the mid portion of the sternum; an abrasion to the superior edge of the areola of the right breast, consisting of two slightly arched segments, suggesting teeth marks; (the right nipple and right areola were abraded with the superficial layer of skin missing with white discloration of the underlying skin) an abrasion between the right labia minora and majora; a cruciate abrasion external to the mons pubis; an abrasion (posteriorly) from the inferior aspect of the entroitus; a laceration (penetrating) to the fornix of the vagina at about 4 to 5 o'clock from the cervix at the distal end of the vagina; an abraded wound immediately beyond the entroitus; and a penetrating wound in the vagina extending into the massive muscle overlying the vertebral column which had penetrated the terminal portion of the ilium. The autopsy further revealed the presence of tree bark in the peritoneum and a penetrating wound inside the throat, which transected the esophagus and thyroid.

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2. 2.5 centimeters = 1 inch.

The pathologist who performed the autopsy listed the cause of death as exsanguination[3] resulting from the multiple wounds inflicted upon the victim. Exsanguination was listed as the death cause because of the lack of blood in the internal organs and the amount of blood retained in the vaginal cavity.

Tests were made to determine whether or not sexual intercourse had occurred. Tests for semen and phosphates proved futile due to the fact that the vaginal cavity was awash with blood.

The time of death was listed between 24 to no more than 72 hours preceding the autopsy. The pathologist testified that there were so many variables that a more definite time could not be affixed. He also testified that he was aware of the time frame regarding the time that the victim was last seen and the time the body was discovered. In his opinion, due to the multiplicity and severity of the wounds, the victim could not have lived more than a few minutes following the attack. He also stated that it was difficult to tell if any particular wounds had been inflicted antemortem or postmortem, but added that the wounds in the internal vaginal area were most likely inflicted postmortem. This conclusion was based upon the absence of blood inside the wounded area.

At the request of local law enforcement officials, the Metro Squad was activated. This special law enforcement agency is a cooperative effort, which is bistate, (Missouri-Kansas), multicounty and multimunicipal in nature. It combines the efforts of law enforcement agencies of several local police departments, the Missouri Highway Patrol, several sheriffs and on occasion, the F.B.I. and other federal agencies. The Metro Squad program is assisted by the Regional Crime Lab. It is activated upon the request of

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3. Literally defined as death caused by bleeding.

any participating local law enforcement agency and assists with the investigation of area major crimes. In the instant case, the Metro Squad became involved at the request of Tom Thomas, Sheriff of Platte County, on September 3, 1977. Marion Beeler, Chief of Police of the City of Raytown (Jackson County), Missouri was designated to head the investigation.

Several teams of investigators, along with evidence and laboratory personnel from the Regional Crime Lab, were pressed into service. After discovering the victim, the Metro Squad continued its investigation, interviewing several persons and pursuing several leads. Though none of the officers could point to one particuar piece of information which led to appellant as a suspect, Missouri Highway Patrolman William Bell described the process of putting all reports and all interviews together to get a total picture, and from that picture, deriving indications that appellant was involved in the matter.

After appellant's name had come to the Metro Squad's attention, (at least two witnesses described appellant's car as having been seen on the Interurban Road and HH Highway, a fellow student stated that appellant had talked to her about Julie Wittmeyer and an assistant to appellant's personal dentist stated appellant told her he was the last person to see Julie Wittmeyer alive) a Trooper of the Missouri Highway Patrol, a Detective McLendon of the North Kansas City Police Department and a Platte County Deputy Sheriff went to interview appellant at Menorah Medical Center. The date of this interview was September 12, 1977, and the officers met with appellant and his mother. No *Miranda* warnings were given as appellant was only advised that his name had come up in the investigation and that his car had been seen in the locations where the crime had occurred.

Appellant related to the officers what had taken place on September 2, 1977. He stated he left school at 12:15 p. m., and had his mother drive him home to get his car. He got his car and went to work. He stated he left work at 3:30 p. m. and got home at 4:00 p. m. At 4:30 p. m., he helped his friends put a radio in their car at his house, and at 5:00 p. m., his parents arrived home. When they arrived, he left with them to go to Menorah Hospital.

On September 15, 1977, Officer McLendon returned to Menorah Hospital to talk with appellant. The purpose of this visit was twofold. First, the officer was attempting to clear up discrepancies in appellant's statement of events of September 2, 1977. The second purpose was to request permission to secure impressions of appellant's teeth.

Persons present at the September 15, 1977 meeting, in addition to appellant and Officer McLendon, included appellant's mother, Steven Carrol, (special prosecutor for the Platte County Prosecutor) and a nurse. *Miranda* warnings were read to appellant and a waiver regarding the presence of legal counsel was signed. It was explained to appellant that he had become a suspect in the matter and tooth impressions would either clear him or further implicate him.

On September 16, 1977, tooth impressions of appellant were taken. *Miranda* warnings were again given. Appellant declined the presence of legal counsel and signed a waiver of rights. Present at this meeting were appellant's mother, a nurse, Dr. Ira Gladfelter and Officer McLendon. Appellant's mother stated that they could proceed with the taking of the impressions. The tooth impressions or casts taken on this date were taken to Hartford, Connecticut, by Sheriff Thomas. The Sheriff met with Dr. Lester Luntz in Hartford. The first casts indicated that appellant was involved, however, there was a slight flaw present in the casting.

On September 30, 1977, Detective Clarence Luther of the Kansas City Missouri Police Department, Corporal Fred Mills of the Missouri Highway Patrol, Sergeant Herb Soule of the Sugar Creek Police Department and Sergeant Merle Rice of the Regional Crime Lab met with appellant, appellant's parents and Dr. Jon Finley at Menorah Hospital. Appellant was advised he was not a prime suspect in the murder of Julie Wittmeyer. No *Miranda* warnings were given as no interrogation ensued.

A waiver granting permission for additional tooth impressions was signed by appellant and both of his parents. Dr. Finley took tooth impressions and the process was photographed by Sergeant Rice. These impressions were again taken to Hartford, Connecticut by Sheriff Thomas. The casts were analyzed by Dr. Luntz. Sheriff Thomas talked long distance with Chief Beeler and Lee Hull, Platte County Prosecutor, on October 1, 1977. When Sheriff Thomas relayed Dr. Luntz's conclusion that the casts matched the bitemarks, the decision was made to arrest appellant.

At 2:00 p. m. on October 1, 1977, Detective Luther, Corporal Mills and Sergeant Soule went to appellant's residence to arrest appellant. Upon their arrival, they were advised that appellant, his father and brother were out getting a haircut. Shortly later, they arrived home. At that time, appellant and his parents were advised that appellant was being placed under arrest for the death of Julie Wittmeyer. Corporal Mills read appellant the *Miranda* warning.

Prior to appellant's departure with Officers Luther and Mills, appellant's mother told appellant not to sign anything or to admit anything. Appellant was transported to the Platte County Court House Annex. Officers Luther and Mills then interviewed appellant. Officer Luther ad-

vised appellant of his *Miranda* rights and specifically advised him that he had right to counsel. Appellant stated he did not have an attorney and that he did not want an attorney. Appellant stated that he would be willing to talk with the officers, but under his mother's instructions, would not admit anything or sign anything.

During this interview, the officers explained to appellant about his being a prime suspect, and also explained the type of physical evidence which they had against him. The discussion about the physical evidence came about in response to appellant's concern and reference to physical evidence. Detective Luther discussed the bite mark and told appellant that the specialists had concluded that appellant's teeth had caused the bite mark found on the victim's body. Appellant, at this point, asked, "So you can prove that I bit her on the breast, but what does that prove?" Detective Luther explained that at no time to any person had the location of the bite been disclosed or discussed. Detective Luther then explained to appellant that it proved that he either bit the victim before or after her death.

Appellant then related his activities of September 2, 1977. He stated he left school at 11:55 a. m., that his mother arrived at school to take him to work and that they argued because he insisted on being taken home to get his own car. The mother drove him home and appellant jump-started his own car and got to his job at the Riverside Drive In at 1:15 to 1:20 p. m. He stated he left work at 3:00 to 4:00 p. m. and got home around 4:00 p. m. He recalled the time of arrival because his brother and sister were watching Gilligan's Island on television.

Appellant denied ever having known Julie Wittmeyer. Finally, the officers asked why wouldn't he tell them how Julie was killed. To this, appellant stated, "If my daddy

will let me tell you, I will tell you everything how she was killed and everything." This interview was concluded somewhere between 4:00 and 6:00 p. m. the evening of October 1, 1977.

At about 6:40 the same evening, Sheriff's Deputy Terry Deister and Corporal Bell of the Highway Patrol again interviewed appellant. Deputy Deister asked appellant if he wished to be readvised of his *Miranda* rights, and appellant said no. Appellant again recounted his activities of September 2, 1977. At approximately 7:30 p. m., this interview was interrupted by the appearance of appellant's attorney. A private conference between appellant, appellant's father and the defense counsel occurred and following this private conference, the defense counsel instructed Corporal Bell not to talk with his client anymore.

Corporal Bell relayed counsel's message to Chief Beeler. On the same day, counsel had talked with Chief Beeler, advising him he was counsel for appellant and that a letter would be forthcoming confirming his representation of appellant. A letter was received on October 5, 1977 or October 6, 1977.

On October 2, 1977, at about 11:26 a. m., appellant was, for security reasons, transferred from the Platte County Jail to the Lafayette County Jail. He was accompanied by Deputy Deister and Corporal Dayringer of the Missouri Highway Patrol. As entry was being made into the patrol car, Deputy Deister read the *Miranda* warning to appellant. Appellant indicated that he understood the warning. During the trip, appellant, at first, did not want to talk about the case, but as the trip proceeded, appellant stated he wanted to continue his statement from the night before. While the *Miranda* warnings were not specifically reread to appellant, he was advised anything he said would be

used against him and an explanation of the results of his statement were explained.

During this trip, appellant continued his statement, explaining that he left the drive-in at 3:45 p. m., that he arrived at his home at 4:15 p. m., while there were cartoons on television, that he called the drive-in trying to contact his parents but got a busy signal, slammed the phone receiver down so hard that he broke the phone, and then tried to repair the phone. Appellant stated that he did not know Julie Wittmeyer. Both officers transporting appellant on October 2, 1977 denied knowing appellant had an attorney.

On October 3, 1977, appellant was transported back to Platte City for arraignment. Although *Miranda* warnings were read, no statements were made by appellant. Appellant was returned to Lafayette County after arraignment.

On October 5, 1977, Detective Luther and Corporal Mills interviewed appellant at the Lafayette County Sheriff's office for 1½ to 2 hours. Officer Luther thought Chief Beeler had assigned him and Mills to interview appellant, but Chief Beeler stated he was not sure that he had made such an assignment. Officer Luther had been present at the arraignment on October 3, 1977, but did not know that the young man with appellant at the arraignment was to be appellant's attorney. Officer Mills was unaware of any attorney being present at appellant's arraignment. At this interview (October 5, 1977), *Miranda warnings were given and appellant signed a written waiver.* Appellant agreed to talk with the officers, but his parents had told him not to admit to anything. Appellant stated he was not sure if his parents had retained an attorney, that possibly they were going to get Attorney Brown, but that he did not know if they were going to

keep him as their attorney. Appellant agreed to talk with the officers without an attorney.

The purpose of the October 5, 1977 meeting was to try to find out "why he killed Julie" and to see if the officers could secure any incriminating statements or confessions from appellant. As the interview continued, it centered upon physical evidence which incriminated appellant. After discussing the bite mark, the officers began talking about going to appellant's home to look for a knife. At this point in the interview, appellant started laughing and said, "You didn't find it, did you?" Then the following conversation took place:

> OFFICER LUTHER: "Mark, how can you be so sure we didn't find the knife?"
>
> SAGER: "I know because if you tell me you found the knife used to kill her that you're lying to me because I know you didn't find the knife."

The conversation continued, and appellant was told that three knives had been found. Appellant advised the officers that they were wasting their time because they did not have the right knife. The following questions and answers then developed:

> LUTHER: "Mark, what did you do with the knife? Did you throw it in the Platte River?"
>
> SAGER: "Let's just say I know you're not going to find the knife."

The discussion then turned to appellant's relationship with his mother, and one occasion when he had choked her. Appellant stated that he knew that was wrong, but that he had just put it out of his mind. Appellant further stated it was possible to do that with the murder of a little girl, saying, "Don't you think it's possible . . what if a doctor

would tell you that I could do something like this and just put it out of my mind, that I would forget it, that I did something like this?" Later, appellant asked, "What if my teeth were off a certain millimeter or something like that, would they still say it was me?" Then, appellant asked if the officers could try to get him into the state hospital rather than prison because inmates wouldn't like anyone that killed a young girl. Appellant stated, "I am sure they'll convict me if I go to trial and I would just as soon go on to the state hospital now."

On October 25, 1977, by indictment, appellant was charged with capital murder and on the same date, appellant entered his plea of not guilty. Request for discovery was made, and trial was set for January 23, 1978 by Judge Yeaman of the Platte County Circuit Court.

The discovery process, pretrial motions and depositions followed. On January 13, 1978, a motion for change of venue was sustained and the cause was transferred to Boone County. Appellant was ordered by the court to undergo mental examination at the state hospital in Fulton, Missouri. On January 24, 1978, appellant was certified competent to stand trial.

On March 2, 1978, appellant filed an extensive motion to suppress, accompanied by a motion to dismiss. The motion to suppress sought suppression of the tooth impressions and statements of October 1, 2 and 5, 1977. Suppression of the tooth impressions was premised upon the fact that the impressions were illegally obtained and that such evidence was not scientifically reliable. Suppression of the statements was sought upon the premise that they were obtained in violation of appellant's rights under *Miranda v. Arizona, supra*, and after defense counsel had specifically instructed that all interrogation cease.

On March 9, 1978, a hearing was held on the motion to suppress. The court denied the motion as it related to the tooth impressions. Ruling upon the motion as it related to the statements of the 1st, 2nd and 5th of October, 1977 was deferred for ruling to a later time.

On May 2, 1978, appellant filed a motion to disqualify Judge Yeaman. This motion was sustained on May 5, 1978, and Judge Conley of Boone County was given jurisdiction to hear the case. Trial was set for May 23, 1978. On May 22, 1978, Judge Conley overruled the motion to suppress as that motion related to the statement of October 1, 1977, sustained the motion to suppress as it related to the statement of October 5, 1977 as to the use of this statement in the state's case in chief, and deferred ruling upon the motion as that motion related to the statement of October 2, 1977. The court ultimately sustained the motion to suppress as the motion related to the statement of October 2, 1977 as to the use of this statement in the state's case in chief.

After jury selection, trial commenced and lasted some eight days. On June 1, 1978, the jury found appellant guilty of manslaughter. The jury could not agree upon punishment. After the verdict, motions for acquittal notwithstanding the verdict and for bail were filed. The motion for judgment N.O.V. was overruled and bond was set at $100,000. A motion for judgment of acquittal or in the alternative for a new trial was filed. These motions were overruled and punishment of 10 years in the Missouri Department of Corrections was assessed. This appeal followed.

Appellant's initial alleged error asserts that the trial court erred as a matter of law and as an abuse of discretion by overruling appellant's motion to suppress evidence of an oral statement given by appellant on October

1, 1977 and by permitting the state to cross-examine appellant about oral statements of October 2, 1977 and October 5, 1977, and the use of the latter statements in rebuttal. It is alleged the court's action violates the Constitutional safeguards protected under the rule enunciated in *Miranda v. Arizona, supra.*

Appellant was arrested at his home on October 1, 1977. At the time of his arrest, he was a high school senior. He was arrested in the presence of his parent. The arresting officer was Clarence Luther, a detective of the Kansas City Missouri Police Department, who testified that he arrived at appellant's home in the presence of other officers. The officers were admitted to the home by appellant's sister, who advised the officers that appellant was at the barber shop with his father. Within minutes, appellant, with his father, returned home. The officers advised appellant and his parents that they had physical evidence connecting appellant with the death of Julie Wittmeyer.[4] The officers informed the appellant and his parents of a particular bite mark found on the body of the victim, but the location of the bite mark was not disclosed.

Appellant's mother showed concern over the physical evidence that the officers had, and she asked permission to talk with appellant for a moment before he was transported to jail. In the doorway to appellant's residence, his mother instructed him not to admit anything or to sign any papers.

Appellant was transported to Platte City. Upon arrival, he was advised of his rights under *Miranda v. Arizona, supra.* He was presented with a form no. 340, which included the *Miranda* warning and a place to affix his

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4. As the record reveals, dental impressions of appellant's dentition preceded his arrest.

signature as a waiver. The officers testified that in addition to giving the *Miranda* warning verbally, and the offer of the form no. 340, they discussed with appellant the fact of whether or not he understood his rights under the *Miranda* warning and whether or not he would be willing to discuss the matter without an attorney. According to the officers' testimony, appellant agreed to talk with the officers, but told them he would neither admit to anything nor sign anything because his mother had so instructed him.

On this same date (October 1, 1977), the officers testified, they continued to talk with appellant, and advised him that he was a prime suspect in the matter of Julie Wittmeyer's death. The officers testified appellant was advised of the bite mark on the victim's body, but the location was not disclosed, and further, that specialists had identified appellant as the party who had placed the bite marks on the victim's body.

The discussion continued, and included reference to identification by bite mark. At this time, the officers claim appellant made the following remark, "So you can prove that I bit her on the breast but what does that prove?" It was the testimony of the officers that the location of the bite had not been disclosed to anyone, including the appellant. The officers testified appellant stated he would admit he did bite the girl, but then added, "What does that prove?"

The officers then stated the discussion centered upon appellant's account of his activities on the day of September 1, 1977. Appellant stated he attended school in the morning and left school about 11:55 a. m. because he had an afternoon job at the Riverside Drive-In Theatre. Appellant advised the officers that he had made arrangements with his mother for her to pick him up from school.

When the mother was not at the school at 11:55 a. m., he called her to come and pick him up. Appellant stated he was picked up by his mother and then got into a fight over his wanting to drive his own car to work. After this argument, his mother agreed to drive him home where he jump-started his car and reported to work. He arrived at work at approximately 1:15 to 1:20 p. m. and proceeded to mow the grass on the lawn of the drive-in. During this time, he had received a message about a phone call. He called his girl friend, who advised him that his mother had called asking her (the girl friend) how to contact appellant as his parents were going to pick him up and take him to the hospital. At this, appellant became angry, as instead of going to the hospital, he wanted to go to a football game that evening. Appellant told the officers that a fellow employee jump-started his car and that he drove, at 70 m. p. h., home.

When asked about his departure time from the drive-in, appellant told the officers it was 3:30, then 3:45 p. m., then since he did not have a watch, it was between 3:00 p. m. and 4:00 p. m.

Appellant then stated he arrived at home between 4:05 and 4:10 p. m. He knew this to be the correct time because "Gilligan's Island"[5] was on the T.V., which his younger brother and sister were watching at the time.

According to the officers' testimony, appellant denied even knowing the victim, but that approximately four years prior to her death, he had gone to the Wittmeyer farm with his parents to buy peaches.

Appellant showed a great concern over physical evidence and expressed a desire to see the dental charts.

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5. Testimony of a witness for Channel 41 testified that on September 1, 1977, the program Gilligan's Island started at 4:27 p. m.

Further discussion centered upon the victim's death. At this point, appellant asked, "What if my doctor says I didn't know what I was doing?" This question was followed by assurances from appellant that he had a good memory. The discussion continued further, when one of the officers asked appellant, "Mark, what's keeping you from going on and telling us all about how you killed Julie Wittmeyer and how she was killed?" After a long pause, appellant held his head down and stated, "If my daddy will let me tell you, I will tell you everything how she was killed and everything." Officer Luther testified that it became obvious nothing further was going to be discussed, so he terminated that particular interview or discussion.

On cross-examination, Officer Luther testified that the interview had lasted about one hour to an hour and a half. He further stated that prior to the interview, the *Miranda* warning had been given appellant, that appellant verbally acknowledged he was aware of his rights, that the written waiver was tendered to appellant, but that under instructions from his mother, he refused to sign the waiver. Upon further cross-examination, Officer Luther stated he kept notes of the interview, and these were later transcribed into his formal report. The evidence also shows that no written summary of the interview was presented to appellant, although the report or a copy of same was provided appellant's counsel under discovery.

Cross-examination revealed that appellant had been arrested, transported to Platte City, and advised of his rights under the *Miranda* warning. Appellant agreed to talk with the officers, but under instructions from his mother, he would not admit or sign anything.

Cross-examination further revealed that appellant asked the officers, "What if my teeth are one millimeter

off, would you still say they matched? The officers responded that an expert had stated appellant "was the one who put the bite marks on Julie."

In continued cross-examination, appellant inquired of the officers as to why there was no mud on his shoes or dirt or dust over his car. The officers reportedly answered appellant by telling him that as far as they knew, there could be dirt, dust and mud on his car and shoes. Appellant denied ever having been on Interurban Road. The arresting officer was asked if appellant's mother had not shown the officer a copy of a telephone bill at the time of appellant's arrest, and the officer answered yes. The arresting officer denied knowing that the defense counsel had even been contacted for appellant, and stated he became aware of an attorney's entry some seven or eight days following the interview of October 1, 1977. The arresting officer did testify, however, that he had learned there was an attorney present with appellant at the arraignment on October 3, 1977, two days after the initial interview.

The foregoing testimony surrounding the arrest and initial interview of appellant was further supported by the testimony of other officers present during the arrest and the interview.

[1] The evidence on this record clearly establishes that appellant was afforded the *Miranda* warning; that appellant was under no mental or educational handicap which prevented his voluntary waiver to remain silent, to be afforded counsel, to know any incriminating statement could be used against him and that he could have terminated the interview at anytime. The evidence is quite to the contrary and reflects no compulsion and no incommunicado interrogation in a police dominated sur-

rounding without full warnings of constitutional rights as mandated by *Miranda v. Arizona, supra.*

It should be pointed out that appellant's motion to suppress the oral statements of October 1, October 2 and October 5 were vigorously and continuously pursued by his counsel. A full hearing comprising many pages of transcript touched upon this issue and the renewal of the motion was vigorously and continuously made by defense counsel throughout the trial.

The trial court correctly concluded that the oral statement of October 1, 1977 could be admissible, in the state's case in chief as the safeguards of *Miranda v. Arizona, supra,* were provided and appellant knowingly and voluntarily waived those rights.

While the law does not require the securing of an express waiver of rights from an accused, see *North Carolina v. Butler,* 441 U.S. 369, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979), the record herein reflects this appellant was provided the *Miranda* warning, knew what his rights were and knowingly and voluntarily agreed to discuss the matter with the officers, reserving only the right not to admit anything or to sign anything because he had been so instructed by his mother.

That portion of appellant's first point of error, relating to the oral statements of October 1, 1977, for the reasons set forth above, are ruled against appellant.

Appellant was transported to the county jail in Lafayette County for security reasons. The oral statements attacked by appellant on his appeal under the dates of October 2, 1977 and October 5, 1977, as the evidence reveals, centered upon the moving or transporting of appellant to and from Platte County to Lafayette County, and during appellant's confinement in the Lafayette County Jail.

On October 2, 1977, appellant was transported from Platte County to Lafayette County in the company of two law enforcement officers. These officers were Deputy Deister and Trooper Dayringer. Deister testified that before entering the patrol car for the trip, he read the *Miranda* warning to appellant and in turn, appellant acknowledged that he understood his rights. It was the testimony of Deister and Dayringer that appellant expressed a desire to discuss the instant case during this trip and that he began asking questions. These officers also testified that appellant expressed a desire to finish his statement made the previous day. Appellant had not been arraigned at the time of this trip. Both officers testified at the hearing upon appellant's motion to suppress, and the following is a recount of the evidence secured from these officers upon this issue.

Deputy Deister testified that before entering the patrol car, he informed appellant of his rights and appellant acknowledged he understood his rights. As the trip first started, appellant indicated he did not want to talk to the officers. The trip continued, and Deputy Deister explained to appellant that the trip to Lafayette County was for security purposes. The discussion then enlarged with details of appellant's arraignment scheduled for the following day, and appellant's being advised the officers would return appellant to Platte County for arraignment. At this point, appellant began to ask questions about the instant case.

During the hearing, Deputy Deister was asked if he knew at the time of the trip whether appellant was represented by counsel. He answered by stating he had seen defense counsel at the Platte County Jail the evening before, but did not engage counsel in conversation. He further testified that appellant told him during the trip

that he had an attorney, but that appellant never indicated he desired the presence of counsel prior to visiting with him and the Trooper. Deputy Deister also stated that he had, at this point, not received any order or instruction not to talk with appellant because appellant was represented by counsel.

Upon cross-examination during the hearing on the motion to suppress, it was learned that Deputy Deister had talked with appellant the evening of October 1, 1977 in Platte County. The deputy placed the time at about 6:40 p. m., and prior to his having seen defense counsel in Platte County. It was also determined that appellant had signed a waiver of his rights under *Miranda v. Arizona, supra,* the evening of October 1, 1977.

According to Deputy Deister's testimony, as the trip to Lafayette County progressed, appellant began talking to the officers in the patrol car. This discussion ensued some 30 minutes after appellant was given the oral *Miranda* warning when he entered the patrol car. The Deputy recounted appellant's statements to him, and the following is the substance of those statements. The appellant, according to the Deputy's testimony, stated he left his job around 3:45 p. m. and described his route home. He advised the Deputy he arrived home about 4:15 p. m. Appellant then stated he attempted to call the Riverside Drive-In to contact his parents, because his parents had proceeded to the drive-in to pick him up. When he got a busy signal on the phone, he slammed down the telephone receiver so hard that he broke the phone. The discussion then included the fact that appellant called his girl friend to tell her he was at home. Appellant then corrected the sequence of phone calls, stating he called his girl friend first. The amount of gasoline in appellant's car was discussed, and the Deputy testified that during his conversa-

tion with appellant the evening of October 1, 1977, appellant stated his gas tank was full, but during the conversation of October 2, 1977, appellant remarked the tank was only one-quarter full.

As the discussion proceeded, appellant denied ever knowing the victim. He further stated he carried a three-bladed pocket knife, but when he entered the hospital, his mother had taken it from him and had not returned it. When asked about his ever having been on the Interurban road, appellant told this deputy he had been on it only on two occasions.

The sequence of events pertinent to appellant's first point of error now shifts to the events of October 5, 1977. The evidence reveals that on October 5, 1977, Officer Luther of the Kansas City Missouri Police Department and Trooper Fred Mills of the Missouri Highway Patrol interviewed appellant in the Lafayette County Jail. Officer Luther testified (in rebuttal) that appellant was informed of his *Miranda* rights. At this October 5, 1977 meeting, *appellant signed a waiver of rights form.* Officer Luther advised appellant of the bite mark evidence, and the conversation moved to the point of the authorities making a search for a large buck knife. According to Officer Luther, at this point appellant "just changed his whole personality and he hit his hand on the desk, slapped his legs and said, 'You didn't find it, did you?' " Following this remark, Officer Luther testified he asked appellant, "Mark, how can you be so sure we didn't find the knife?" to which appellant was reported to have said, "I know because if you tell me you found the knife used to kill her that you're lying to me because I know you didn't find the knife." Officer Luther then asked appellant, "Mark, what did you do with the knife? Did you throw it in the Platte River?" to which appellant was reported

to have stated, "Let's just say I know you're not going to find the knife."

A discussion then followed, which covered appellant's relationship with his mother. According to Officer Luther's testimony, appellant had, on a prior occasion, choked his mother. Appellant reportedly told this officer that he knew his action in choking his mother was wrong but that he just put it out of his mind like he didn't do it.

The discussion then proceeded to the killing of the victim, and appellant reportedly told this officer, "Don't you think it's possible (and he kept referring to the doctors) . . . What if a doctor would tell you that I could do something like this and could just put it out of my mind, that I would forget it, that I did something like this?" This discussion ended on a point concerning the appellant's teeth, and appellant reportedly asked the officer, "what if my teeth were off a certain millimeter or something like that, would they still say it was me?"

Trooper Mills then took the stand (in rebuttal) and testified to the events of October 5, 1977. He testified that appellant signed a waiver of rights form. When asked about the knife, he stated appellant asked, "You didn't find it, did you?" and further, "You're wasting your time if you say that you have the knife that was used to kill her. You're lying to me because I know you don't have the right knife." He then asked appellant how he was sure the authorities did not have the right knife and appellant reportedly answered, "I know you will never find the knife that was used to kill her." He asked appellant where he put the knife and had he thrown it in the Platte River, whereupon appellant answered, "I told you I know that you will never find the knife."

The interview ended at this juncture on the following note. Trooper Mills testified appellant inquired where he might be confined and reportedly told the officers he did not want to go to prison, because he thought he would be killed because he knew other inmates would not like anyone who killed a young girl. Appellant reportedly asked the officers if they would try to get him into the state hospital. After the officers reportedly advised appellant such a matter was between the court and the attorneys, appellant stated, "I am sure they'll convict me if I go to trial and I would just as soon go on to the state hospital now."

The foregoing testimony and all other statements secured from and reportedly given by appellant on the dates of October 2 and 5, 1977, were subject to appellant's motion to suppress, alleging they were in violation of his rights under *Miranda v. Arizona, supra.*

In pretrial matters, the deposition of Marion Beeler, Chief of Police of Raytown, Missouri, and the officer in charge of the Metro-Squad assigned to the instant case, was taken and the testimony reveals that defense counsel had orally advised this officer of his entry into the case.

The record reveals the following chronology of events. On October 1, 1977, appellant was arrested and interviewed while in custody. The record shows, although admonished by his mother not to sign or to admit to anything, that appellant was advised of his constitutional rights as per *Miranda v. Arizona, supra.* The record further shows that appellant knowingly and voluntarily waived his rights regarding the October 1, 1977 interview and the trial court properly admitted such evidence adduced therefrom as part of the state's case in chief.

[2] Defense counsel appeared in Platte City the night of October 1, 1977. This appearance followed the

initial interview of October 1, 1977. Such appearance was, however, sufficient under the evidence to put law enforcement officials on notice of counsel's representation of appellant regarding events following the initial interview. While the evidence is unclear as to whether investigating officers were directly advised of defense counsel's appearance by their superiors, the trial court properly suppressed the statements of October 2, 1977 and October 5, 1977 as part of the state's case in chief upon the failure of the state to carry its burden of proof that law enforcement officials did not know appellant was represented by counsel.

If the chain of events relating to the statements of October 2 and October 5, 1977 had ceased at this juncture, such statements would be of no import on this appeal. However, during trial, appellant took the stand in his own defense. During cross-examination, appellant denied committing the offense with which he was charged, testified that the officers were lying about everything about which they testified and offered an alibi defense.

The state, over objection, was permitted to cross-examine appellant about his statements to the officers on October 2 and October 5, 1977. The premise was impeachment upon prior inconsistent statements. In addition, the evidence surrounding the statements of October 2 and October 5, 1977 were admitted over objection as rebuttal evidence for the state.

[3] The question which falls to this court is whether the statements of October 2 and October 5, 1977, not having been admissible as part of the state's case in chief because the obtaining of them violated the rules under *Miranda v. Arizona, supra,* were nonetheless admissible during cross-examination and rebuttal to attack the credibility of appellant on prior inconsistent statements. This question is novel neither nation-wide nor in our own state.

It is true that *Miranda v. Arizona, supra,* properly insures to an accused the constitutional protection against involuntary statements while in custody. It is also true that such statements might well be utilized in other fashion during the course of trial.

[4] There are two criteria which must be followed when using statements by way of impeachment and rebuttal. The first is a showing that such statements are voluntary, see *Miranda v. Arizona, supra*; *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963); *State v. Fair,* 467 S.W.2d 938 (Mo.banc 1971) and *Mincey v. Arizona,* 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). In the instant case, objection was interposed, but the record does not reflect such objection challenged the voluntariness of the statements and there was no request for an independent formal hearing upon the issue of voluntariness. The court is not required to conduct such a hearing on its own motion, see *State v. Jackson,* 448 S.W. 2d 895 (Mo.1970), reaffirmed in *State v. Harper,* 465 S.W.2d 547 (Mo.1971). The ruling on voluntariness, of course, stems from the landmark decision in *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 538 (1964), and such proceedings have been commonly referred to as "*Denno* hearings". Appellant objected and stood upon the principle that since such statements had been suppressed relative to the state's case in chief, they stood suppressed throughout.

[5] The posture of the October 2 and October 5, 1977 statements changed when appellant took the stand in his own behalf. The safeguards of *Miranda v. Arizona, supra,* and other federal and state decisions do not equate with complete prohibition against the use of statements or confessions at other stages of a trial proceeding, see *Harris v. New York,* 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.

2d 1 (1971). The instant case provides for no prohibition against the use of the statements of October 2 and October 5, 1977 on the grounds of voluntariness. While on this appeal it is argued that since the statements were suppressed in the state's case in chief and they stood as such throughout the trial, there is no showing upon trial at the time of cross-examination and rebuttal that such statements were involuntary; and absent any attempt by appellant to request such a showing, this court is left to merely speculate what such a request, if any, reveals.

Turning to the second criterion, it must be shown that the use of such statements must rest upon the laying of a proper foundation. § 546.260, RSMo 1979 provides that an accused shall not be required to testify on his own behalf, but if he or she elects to do so, he or she is subject to cross-examination and such testimony may be contradicted or impeached in the same manner as the testimony of any other witness in the case.

As regards rebuttal evidence offered as impeaching evidence on prior inconsistent statements, certain limitations have been imposed so as to safeguard the rights of an accused. These safeguards are to test and assure the reliability of the impeaching evidence.

[6] Authority long established in our state provides prior statements cannot be used unless the witness is first asked if he made the statement, see *Huskey v. Kane Chevrolet Co.*, 173 S.W.2d 637, 640 (Mo.App. 1943); attention of the witness must be called to the time, place, circumstances and person to whom the statement was made, see *State v. Bennett,* 87 S.W.2d 159, 162 (Mo.1935); and in order to show by other witnesses prior inconsistent statements of an accused, a foundation must be laid by interrogating the witnesses concerning the alleged inconsistent statements, see *State v. Thompson*, 280 S.W.2d 838

(Mo.1955). In a more recent decision, *State v. Kelly,* 539 S.W.2d 106, 112 (Mo.banc 1976), citing *State v. Vaughn,* 501 S.W.2d 839, 842 (Mo.1973), the highest court in our state declared, "A foundation must first be laid by asking the witness on cross-examination if he made the statement, and obtaining either a denial or an answer that he failed to remember it." The authority cited herein clearly denotes it is the substance rather than the form of the question or questions that is controlling.

The statements of October 2 and October 5, 1977 were admissible under *Harris v. New York, supra,* if they followed other requirements as to admissibility, see also *United States v. Rooks,* 577 F.2d 33, 37, 38 (8th Cir. 1978), *cert. denied* 439 U.S. 862, 99 S.Ct. 183, 58 L.Ed.2d 171 (1978), and *United States v. McIntyre,* 467 F.2d 274 (8th Cir. 1972), *cert. denied* 410 U.S. 911, 93 S.Ct. 972, 35 L.Ed. 2d 274 (1973). It is against this authoritative background that the admissibility of the instant statements must be viewed.

Before proceeding to take up the evidence in the instant case, it must be pointed out that the prohibition announced in *Mincey v. Arizona, supra,* does not control because admissibility herein does not turn upon the premise of involuntariness as previously pointed out. Further, appellant cites for the court, *State v. Johnson,* 524 S.W.2d 97 (Mo.banc 1975) which dealt with suppression of an undisclosed prior statement. Appellant herein, however, prior to trial, had deposed all of the rebuttal witnesses, and the subject matter of the impeaching testimony and the rebuttal testimony was known to appellant. *State v. Johnson, supra,* turned upon a discovery and not a constitutional question.

Appellant took the stand in his own behalf. On direct testimony, he was asked the following pertinent questions and gave the following pertinent responses:

"Q. Tell us in your best judgment what time did you get home?

A. I got home around about ten-after-four.

* * *

Q. You also heard him [the police officer] state that later that you said that if he would let you talk to your father, you would tell him how Julie was killed; did you make that statement?

A. No, I did not.

* * *

Q. What did they tell you about the bite mark?

A. They said Julie had been bitten on the breast.

* * *

Q. [By Mr. Brown] I'll ask you now, Mark, jam out: Did you kill Julie Wittmeyer?

A. No, I did not kill Julie Wittmeyer.

* * *

(upon cross-examination)

Q. All right. Starting with—when your mother came to get you, did you get in an argument with her?

A. No, sir, we did not.

* * *

Q. Do you remember making this to Officer Luther: Mark was asked what time he arrived home and he said he did not have a watch and had to guess at the time and estimated it to be just a few

minutes past 4:00 p.m. because his younger brother and sister were watching Gilligan's Island on TV when he entered the house.

A. That is not true.

* * *

Q. Did—Mark was asked what it would take to tell us how—Mark was then asked what it would take to get him to tell us how his teeth impression got on Julie's breast and how Julie was killed—right; did they ask you that?

A. They did ask me that.

Q. Your answer was: 'Mark then repiled "If my Dad tells me to tell you, I'll tell you everything and how Julie was killed." '

A. I did not make that statement. I told them I would like to talk to my Dad because I had not done anything.

* * *

Q. . . . Did you ever make the statement to Mrs. Riegelman that you were the last person to see Julie alive?

A. I did not.

* * *

Q. Did you ask the police officer, that is Fred Mills and Mr. Luther talking to you over to the Lexington Jail, did you ask them what physical evidence they had against you?

A. Yes, I did.

Q. What did they reply?

A. They would not tell me.

Q. 'We told him we had searched his house with a search warrant for the knife that was used to kill Julie Wittmeyer.'

A. They did not state that.

Q. They didn't say that? That's a lie? Then you said to them: 'You didn't find it, did you?' Right; did you make that statement?

A. No, sir, I did not.

Q. That's a lie too. 'We told him we found three knives and that we were checking them out. Mark then started grinning and laughed and said "You're wasting your time and if you say that you got that knife that was used to kill her, you're lying to me because I know you don't have the right knife."'

A. I did not make that statement.

Q. That's a lie, too?

A. Yes, it is.

Q. 'He then started laughing again and said "I know you will never find the knife that was used to kill her."' You say that?

A. No, sir, I did not.

Q. 'We then asked Mark where he put the knife and he just smiled and said "I know you will never find it."'

A. I did not make no statement.

Q. 'When we asked Mark if he threw it in the Platte River', which was flooding at the time, by the way—'Platte River, and he continued to smile and said "I told you I know that you will never find the knife."'

A. I did not make that statement.

* * *

Q. [By Mr. Allred] Do you recall the officers—again this is the officers who came over to interview you on the 5th of October; okay?

A. Yes.

Q. You are oriented as to the place we are?

A. Yes. Lexington Jail, we're at the Lexington Jail.

Q. Right. October 5, 1977.

A. Yes.

Q. And did you tell the police, do you recall the police asking you if you really thought you could forget something as terrible as this killing was?

A. Repeat the question.

Q. Do you recall telling the police, telling you could you really forget something as terrible as killing someone?

A. No, I did not make that statement.

Q. Did not. Did you tell them one time you choked your mother and you knew it was wrong, but were you able to put it out of your mind?

A. No, I did not state that.

Q. That's a lie too. Did you ask the police officers if they would try to help you get you into the State Hospital?

A. Did I ask them?

Q. Yes.

A. No, I did not.

Q. Did you tell the police that you would rather not go to prison for murder because you thought they—you'd be killed by the other inmates?

A. No, I did not.

Q. Because you were sure other inmates wouldn't like anyone who killed a young girl?

A. That is what they told me. They said people down at the prison would not like what I—what they had done, and I told them that that just to leave me alone.

Q. Just to leave you alone. Then did they ask you—I mean, then did you ask then if they would try to help you get into the State hospital instead of the penitentiary?

A. No.

Q. To get some treatment and some help?

A. No, sir.

Q. Okay. That you would rather do that than go to prison; you didn't say that?

A. No, sir, I did not.

Q. Did they tell you this would have to be something worked out between your attorney and the Court and then did you say 'I am sure they'll convict me if I have to go to trial and I would just as soon go to the State Hospital now'? Did you make that statement?

A. No, sir. Mr. Luther and Mr. Mills did not ask me any questions at all."

The foregoing testimony as regards both cross-examination and rebuttal provides the record with the determination of whether or not such evidence met the requirements of federal and state authority to warrant its being admitted.

Appellant's attention was directed to the time, place, circumstances and person to whom the statement was made, *Huskey v. Kane Chevrolet Co., supra;* a foundation was

laid for introduction of rebuttal evidence, *State v. Thompson, supra;* appellant was asked if he made the statements and was permitted the opportunity to deny making such statements or to state his failure to remember making such statements, *State v. Kelly, Harris v. New York* and *United States v. Rooks, supra.*

As the record reveals herein, the state was attacking the credibility of appellant, which is an acceptable adversary practice in an attempt to gain the truth within the trial of a lawsuit. That such is permissible, see *State v. Moore,* 546 S.W.2d 10, 13 (Mo.App.1976).

While the rules of *Miranda v. Arizona* and *Mincey v. Arizona, supra,* properly safeguard the constitutional safeguards of an accused, such rules do not extend to bar the use of all such statements in criminal prosecution. As was clearly and properly pointed out in *Harris v. New York, supra,* 401 U.S. at 225-226, 91 S.Ct. at 645-64.

> "Every criminal defendant is privileged to testify in his own defense, or refuse to do so. But that privilege cannot be construed to include the right to commit perjury . . . (citations omitted) . . . Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be contended that the conflict could not be laid before the jury by way of cross-examination and impeachment.
>
> The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."

The instant case clearly falls within the rule of *Harris v. New York, supra,* and within the rules established by our own courts regarding impeaching testimony.

The trial court properly permitted cross-examination of appellant upon prior inconsistent statements for purposes of testing his credibility. The further ruling to permit rebuttal evidence upon the same premise was clearly within the rules and authority for the admissibility of such evidence. Sufficient foundation was laid to test and establish the trustworthiness of such evidence and the trial court's ruling that such was admissible was clearly proper.

The contention of appellant that because the court had suppressed the statements of October 2 and October 5, 1977 regarding the state's case in chief, such statements must be suppressed for all purposes, cannot stand in light of the lack of evidence that such statements were involuntary. During these meetings, appellant was advised of the *Miranda* warning, he voluntarily engaged the officers in conversation about the case and at no time did appellant insist on his right to remain silent or to have counsel present.

[7] The trial court's ruling that the statement of October 1, 1977 was admissible in the state's case in chief was proper upon appellant's failure to show such statement was involuntary under *Miranda v. Arizona, supra.* The trial court's ruling that the statements of October 2 and October 5, 1977 were inadmissible in the state's case in chief was proper upon a finding that the state had failed to carry its burden showing the state was not aware of the entry of defense counsel at the hearing upon the motion to suppress. The ruling of the trial court, upon the use of the statements of October 2 and October 5, 1977, for cross-examination and the admissibility thereof as rebuttal testimony, was proper for purposes of impeachment upon

prior inconsistent statements under *Harris v. New York; United States v. Rooks; Huskey v. Kane Chevrolet Co.; State v. Thompson; State v. Bennett; State v. Kelly* and *State v. Vaughn, supra.*

Point one is ruled against appellant.

Appellant's second contention of error is that the trial court erred as a matter of law and abused its discretion by allowing the state's witnesses to give their opinions, over objection, as to the person who placed the bite mark on the breast of the victim. Appellant's alleged error is further subdivided upon the contention that the science of bite mark identification has not reached the stage of scientific reliability and credibility to permit its use as evidence in criminal trials; the state's witnesses were not sufficiently qualified as experts to offer an opinion as to the identity of the perpetrator of the bite mark and the factual basis of said opinion was not supported by reliable and competent evidence.

Appellant's contention presents to this court three questions, one of which relates to a broad general question regarding evidence and the remaining two as to whether or not the evidence in the instant case supports or fails to support appellant's contention. These questions are as follows:

(1) Has the science of bite mark identification developed to such a degree as to its reliability and credibility to permit its use as evidence in criminal proceedings?

(2) Does the evidence show or establish the qualifications of the state's witnesses as experts, enabling them to render an expert opinion?

(3) Was the factual basis which served as the basis for expert opinions herein supported by reliable and credible evidence?

The second alleged error posed by appellant forces consideration of the field of forensic odontology, which has been defined as the application of the science of dentistry to the field of law, and represents one of many fields which comprise the forensic sciences. Forensic dentistry is synonymous and interchangeable with the designation, forensic odontology.[6]

The entity of forensic dentistry comprises four major areas of interest:

(1) dental identification of the unknown body

(2) bite mark comparison

(3) trauma and the oral tissues

(4) dental malpractice and negligence[7]

The first recorded case involving forensic odontology was the celebrated case of *Commonwealth of Massachusetts v. Dr. John White Webster,* decided in 1850. The victim's body had been burned in a furnace to a point where ready identification was impossible. Among the remains was a crushed skull and a portion of a porcelain denture. The victim's dentist was permitted to testify. Waxups and impression models were permitted to be introduced by the trial court. There was defense evidence opposing the state's evidence. The court held that the credibility of dental evidence was a matter to be decided by the trier of fact. In essence, forensic dentistry was thus born.

Since the *Webster* decision, countless occasions have arisen where the practice of forensic odontology has been applied. It was used to identify thousands of victims

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6. An appendix reflecting the research material utilized by the court herein relative to bite mark identification is attached hereto for use by the reader.

7. I. Sopher D. D. S., *Forensic Dentistry* (1976).

of the Nazi horror after World War II. Other occasions have included victims of bombings, fires, drownings and other, both singular and en mass, situations where this scientific process has been put into operation.

The matter before this court, of course, comes within No. 2 of the above definition. It might be asked if, how and when do our courts exactly determine the admissibility of new scientific techniques. The general rule for determining such admissibility was laid down in *Frye v. United States,* 54 App. D.C. 46, 293 F. 1013, 1014 (1923). That rule is as follows:

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs."

Appellant, under his second point of error, makes a three-pronged attack outlined by the three foregoing questions. The following resolve of this alleged error calls for the combined consideration of the evidence upon the record, coupled with research within authoritative text material which speaks to this scientific area. That which follows is the evidence provided by the experts upon the record interrelated with information secured from various authoritative text materials. It is urged that the appendix attached hereto be referred to as the main reservoir of source material on the subject matter in general.

The prosecution presented expert witnesses who testified as to the method and procedures used to (a) photo-

graph the bite mark upon the victim, (b) obtain impression and prepare casts of appellant's dentition and (c) arrive at a final conclusion that the bite mark upon the victim's body was made by the person from whom the casts were made.

Stephen Warlen, a latent print and photographic technician assigned to the Regional Crime Lab was qualified as an expert.[8] He was present on September 6, 1977 at the Rollins Funeral Home. He took photographs of the bite mark on the victim's breast. These photos were taken with a Nikkormat 35mm camera, with a Nikkor Micro-lens mounted upon a tripod, along with a Honeywell Strobonic electronic flash. Kodacolor 200 film was used. In all, 17 photos were taken. While the photos were being taken, a flexible ruler was placed alongside the bite mark so the negative and resulting print were accurately enlarged to reflect an actual size of the breast. This provided a "one-to-one" sized print and negative. The photos were taken in the presence of the county coroner, another employee of the Crime Lab and a dentist, Dr. Ira Gladfelter. The photos and negatives were marked as evidence and transported by Sheriff Thomas to Dr. Luntz in Connecticut. The prints and negatives were introduced into evidence.

Dr. Jon Finley, a practicing dentist, was qualified as an expert witness. He testified that on September 30, 1977, he took dental impressions of appellant at Menorah Hospital. Dr. Finley testified that to secure the impressions, he performed the following: (a) he mixed an irreversible hydrocolloid alginate which was used to make 3 sets of impressions and a polyether which was used to make one set of impressions; (b) he placed the mixture

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8. See appendix for statement of all expert witnesses' qualifications.

in metal trays which one by one were fit over appellant's teeth and after allowed to set on the teeth, the trays were gently but firmly removed from appellant's mouth; (c) the impressions were visually checked for defects (one alginate unit but not the whole set was discarded); (d) the impressions were transported to his office (the alginate sets were inside damp paper towels and the polyether transported dry in a box); and (e) at his office he made out of dental stone one cast from each alginate impression and two from the polyether impression.

Dr. Finley found imperfections in the casts on the gum tissue, but none on the tooth portion of the casts. He further testified that after many years of dental practice, including examination of a large number of teeth, he had never discovered any teeth of two individuals to be exactly the same.

Dr. Lester Luntz, a dentist in Hartford, Connecticut and qualified as an expert witness, testified that on September 21, 1977, Sheriff Thomas brought to him the photographs and negatives made by Mr. Warlen. Enlargements of the negatives were made to achieve a one-to-one ratio, and a transparency of the bite mark was made, creating a master black and white negative. On October 1, 1977, Sheriff Thomas returned with the casts of appellant's teeth.

Dr. Luntz then testified to his comparison methods. He first determined the bite mark was of human as opposed to animal origin. He proceeded to orient the bite (i.e., studying the bite mark thoroughly to see any details present and to determine which teeth were upper and which were lower). He then attempted to develop the relationship between the casts and the bite mark. This first step of comparison was an attempt to exclude the casts as having produced the bite marks. Since exclusion was

not possible, he then compared individual marks with individual teeth, and individual identifying features in the bite marks were isolated.

Dr. Luntz testified that he assigns value to the identification of any one tooth and looks for specific identifying features such as shapes, higher and lower edges chipped or poorly developed teeth and the alignment of the teeth. Following this, Dr. Luntz identified the following features of appellant's dentition: (a) poor alignment, a shift to the left of the lower teeth; (b) lower incisors displaying a lingual tilt (toward the tongue); (c) lower right cuspid tilted outward and lower left cuspid tilted inward; (d) presence of three mamalons on the facial surface of the two first incisors (this indicates young age); (e) upper and lower teeth at different elevations and (f) lower left first incisor worn and lower than other teeth.

In the process of comparison, Dr. Luntz testified that he first oriented the midline on the cast and the photograph of the bite and then worked backward, comparing upper and lower teeth with upper and lower marks on the photograph. No point system was used, rather, on overall relationship of cast to the marks, determination of the number of teeth producing the marks, observation of the relationship between the two jaws and comparison of individual details of each particular cast was made.

Dr. Luntz's concluding opinion included the admission of no standard procedure for arriving at conclusions by forensic odontologists, and the system he used would not necessarily be used by all experts. He explained, however, that even though different systems might be used, the conclusions reached would be the same. He further concluded that no two people could have identical mouths. It was his opinion that one discrepancy between a bite mark and a set of teeth would rule out a suspect. He

stated that each case was individual in nature, and that saliva tests.[9] impressions or photographs prior to autopsy were not essential.

Dr. Luntz concluded that the bite mark reflected in the photograph of the breast of the victim was beyond a reasonable doubt placed upon the victim's breast by appellant.

Expert testimony on behalf of the prosecution continued with two experts from England. Mr. Roger Summers was qualified as an expert in police photography. He testified that State's Exhibits Nos. 51-61 and Nos. 78-88 were prepared from one original photo from the Regional Crime Lab and photographs were taken of the duplicate cast made by Dr. Furness. (These were photos depicting Dr. Furness's comparisons.) Mr. Summers explained that the original color photograph was a one-to-one reproduction of the bite mark with a ruler scale. He also made a one-to-one negative of this photograph and transposed this to a one-to-one black and white print. In this process, a fine screen of 188 lines per inch was placed over the focus mechanism of the camera. Accuracy of the photo was checked by counting these 188 lines by a microscope. The ruler used was one passed by the National Physical Laboratory as being 100% accurate. It was Mr. Summers' opinion that this method reproduced an accurate one-to-one photograph and negative. In this process, tungston lighting, a four-by-five camera, fine grain film and resin-coated paper were employed to guard against shadows, shrinkage and expansion, which if allowed, would have caused distortion.

Dr. John Furness of Liverpool, England was qualified as an expert. He testified that Deputy Deister delivered

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9. Tests show blood types in about 80% of cases can be determined from human saliva due to the secretion of blood in saliva.

to him a one-to-one colored photograph of the victim's right breast, along with the dental casts of appellant. Dr. Furness made exact duplicates of the casts of appellant's dentition. He further requested and supervised the photography of Mr. Summers. He testified that in his attempt to locate points of dissimilarity, he compared the original colored photo and the casts of both the upper and lower teeth on the photo and found "points of compatibility". He then turned his attention to looking for points of similarity. He first determined that the bite mark represented in the photo was human in origin, being made by four upper teeth (outer surfaces of the four upper incisors were found) and five lower teeth (made by the front lower left cuspid, lower left second incisor, lower left first incisor, lower right first incisor and lower right second incisor). In making this examination, Dr. Furness testified he found 52 points of similarity between the casts and the photo of the bite mark.

Dr. Furness testified he had viewed approximately 150 bite mark cases and that if one dissimilarity appeared, this would exclude the person as a suspect. He further stated that although it might appear to the layman that bite marks appear similar, it is impossible for two humans to make exactly the same bite mark. He explained his analysis depicted in the visual aids used as exhibits explaining how the teeth corresponded to the bite marks, describing the reasons for assigning each of the points of similarity. The points of similarity were assigned on the basis of corresponding positions, high spots, spacing irregularities and outer surfaces of the teeth. He denied that embalming a body would distort a bite mark. He concluded that in his opinion, "based upon reasonable medical and dental certainty" that the person from whom the casts were obtained inflicted the wound depicted in the colored photograph. It was his opinion that appellant was the perpetrator of the bite mark.

The defense countered with its own expert evidence. The first expert was William Nott, an experienced photographer. He testified as to the procedures and techniques he employed concerning preparation of the defense exhibits. He prepared a one-to-one photo of the right breast of the victim. This photo became defense exhibit No. 36 and was derived from negatives of the same body area, and these negatives were state's exhibits Nos. 46 and 50.

Additional defense expert testimony was provided by Dr. Edwin Everett Andrews of Oklahoma City, Oklahoma. Dr. Andrews was qualified as an expert witness.[10] He testified as to the procedures and techniques he employed and the conclusions he reached regarding the bite mark evidence. On April 29, 1978,[11] Dr. Andrews examined appellant's dentition. He, at the same time, took numerous photos of appellant's teeth. He made an upper and a lower impression of appellant's dentition. On April 30, 1978, Dr. Andrews proceeded to the Regional Crime Lab and was shown certain evidentiary objects. These items included photos of appellant's dentition, along with photos of the right breast of the victim. In addition, Dr. Andrews was handed a cast or impression of appellant's dentition.

Equipped upon trial with the cast or impression of appellant's dentition (state's Exhibit No. 31) and the applicable photos (state's Exhibit No. 58), the doctor in front of the jury demonstrated how he placed the cast or impression of appellant on the photo. After this demonstration, the doctor, as follows, continued:

"A. At that time we showed the upper mark here on the breast and we showed a round mark to

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10. See appendix for qualifications.

11. Transcript read 1977, but the proper date reference is 1978.

the left of the oblong one here and a round mark on the right. We then looked at Mark Sager's dentition and by placing Mark Sager's dentition in this position on a flat surface, with the two cuspids or eye teeth in contact, it is very obvious that the two front teeth or central incisors and the two lateral teeth, lateral incisors, are not making contact with the flat surface. We call this being above the plane of occlusion. Therefore, if this model were to cause a mark in a soft substance such as human flesh, these two teeth would have to proceed—[interrupted]

* * *

Q. [By Mr. Brown] continue, Doctor.

A. These two teeth would have to proceed into the tissue ahead of the teeth that are above the plane of occlusion. When we look at this photograph and this mark, and we place Mark Sager's model, and these areas and we will show this in here, we see that there's no cuspid mark on this side. This cuspid is not marking in here, and if we look over on this side, this cuspid is not marking in here. May I mark there for the jury's benefit?

* * *

A. This point here is missing, cuspid mark, and this cuspid mark is missing here. They are not on the picture. To me, that represents two discrepancies, and in bite mark evidence, when you have a discrepancy, you have to completely eliminate that person as having caused the bite mark. We also look at the photograph and we see these two rounded objects to the left and to the right of the two central incisors. See where they are rounded here and here? See that? Everyone

see that? The marks in there are definitely rounded. Now, bite mark evidence is basically very similar to tool marks. If you have tool marks, you have to show an imprint of the tool on the surface that was applied to. If we look at this dentition of Mark Sager's, these are the incisal edge, the cutting edge of these teeth are rectangular, like a little rectangle, the centrals are rectangle. The lateral incisors, the one next to them, are rectangular, and the cuspids are pointed. And there is no way that a rectangular surface can cause a rounded bite mark on a surface. And with two rounded marks here and two rectangular tools here, I have to assume that this model could not have caused that bite mark, because the tool does not match the surface it was applied to. So we have an area now of four discrepancies. We have no cuspid mark and we have the wrong shape for the lateral incisors.

Q. Resume your seat, now, Doctor.

Now, at that time you were using the dentition that was supplied to you by the Crime Lab which represented to you to be the dentition of Mark Sager; is that true?

A. That is correct.

Q. And you also had the benefit of the day before of actually personally examining the defendant Mark Sager?

A. That is true.

Q. And as to these cuspids, were they on April 29, 1978, were those cuspids in the mouth of Mark Sager as prominent as they appear on that model?

A. They were.

Q. Did you measure with some type of device the distance that these cuspids stick out over the flat plane, or maybe I'm not using the right language.

A. Th cuspids extend roughly a millimeter-and-a-half below the incisal edge of the lateral incisors.

Q. Did you later receive by mail some black-and-white photographs that matched and were the exact duplicates of Photograph 1 of Exhibit 58-A?

A. I did.

Q. I'll hand you what has been marked Defendant's Exhibit 22-L, ask you to check that photograph, Doctor. I'll ask you if that is—wait a minute. Did you have some prints made off the black-and-white print that you received?

A. First I received the print.

Q. What was your next procedure?

A. I then had numerous copies made of this one-to-one photograph in monocolor.

Q. Who made those for you?

A. Mr. Richard Reed.

Q. Were they made to your specifications?

A. They were.

Q. What were your specifications with relationship to 22-L, which you have indicated, stated is an exact duplicate of 58-A-1?

A. I asked him to correct the scale so it was one-to-one, because there is a slight error in that book.

Q. You mean in this book?

A. In that book. And I asked him on his duplication to make sure he corrected it with his enlarger to get it exactly one-to-one, which he did.

Q. Is it necessary to have that as closely one-to-one as possible in order to give an accurate opinion later on about what it shows?

A. It is very necessary, because we're dealing with marks that are of a millimeter length, which is very fine."

The evidence further reveals Dr. Andrews then secured the assistance of a live model which, in his judgment, approximated the size and weight of the victim. He wanted to reproduce or recreate the situation in the death of the victim. The casts or impressions of appellant's dentitions were placed on the model's right breast. From this experiment, the Doctor testified:

"Q. So then when you used the actual dentition—dentition, I'm going to get it yet—that you had of Mark Sager, right on your live model and attempted to duplicate that bite, the dentition of Mark Sager definitely left two cuspid marks on her breast?

MR. PLUMB: Objection. Leading the witness.

THE COURT: Objection will be sustained. Reframe your question, counselor.

Q. [By Mr. Brown] Did the models of Mark Sager leave cuspid marks on the breast of your volunteer?

A. They did. Now, may I say something else?

MR. PLUMB: Objection. There's been no question asked.

THE COURT: Ask your question, counsel.

Q. [By Mr. Brown] You have some explanation of that particular point?

A. We got cuspid marks on the breast. We also got a linear pattern, rectangular pattern for the lateral incisors on that experiment also.

Q. Did that bear out your initial judgment that you formed from looking at Photograph 1, 58-A, Exhibit?

A. It did.

Q. Were there any other discrepancies shown by this bite that was made upon your model as opposed to that photograph?

A. At that time a fifth point of discrepancy came into plain view, and that is the arch form, the curvature of the bite mark was different than the curvature of the mark on the one-to-one photograph.

A. We then wanted to test it farther [sic], so we took the articulated models that we had, and we proceeded to the morgue of the Chief Medical Examiner for the State of Oklahoma. In the morgue, we found a female cadaver of rather small breast size, and we once again established our 27mm. opening and we pressed the articulated models into the breast of the cadaver material as firmly as we could.

Q. Is that the articulated models of Mark Sager's dentition?

A. Those were the articulated models of Mark Sager's dentition.

Q. Did Mark Sager's dentition leave cuspid marks on this material, this cadaver?

A. Mark Sager's teeth left cuspid marks on that cadaver. They also left linear lateral incisor marks, very similar to the marks on the live model."

Following this procedure and additional thereto, Dr. Andrews secured several models of upper and lower dentitions and made comparisons with appellant's dentition. It was this witness's opinion that out of 75 such models, he found eight cases that had the same number of similarities to the bite mark, represented by photo, upon the victim's right breast. Dr. Andrews testified that one major discrepancy rules out any one suspect. After giving the details of his procedure and technique, Dr. Andrews stated his opinion, which was as follows:

"Q. It appears from the testimony of the medical witnesses that have testified ahead of you that there is one standard in the forensic odontology field limited to bite marks, that if you find one major discrepancy, then you have to rule that person out as the perpetrator of the bite mark. Do you agree with that presumption?

A. Absolutely, because there is no standard at this time for point numbering, for point numbering system for inclusion of positive statements as to who could have caused the bite mark. Therefore, with one discrepancy, we have to throw that person out as a suspect. At this time I have found five discrepancies and dissimilarities.

Q. Doctor, based on all of your procedures and your education and your experience, in your work, do you have an opinion based on medical certainty, medical and dental certainty as to whether or not Mark Sager placed the bite upon the breast of Julie Wittmeyer?

MR. PLUMB: Objection. No proper foundation has been laid to show this man's an expert nor to show—find the materials used were accurate and proper.

THE COURT: Objection will be overruled.

A. I have an opinion.

Q. [By Mr. Brown] What is that opinion, Doctor?

A. That no way can Mark Sager have caused that bite mark, because the bite mark that we made with Mark Sager, no way compared with the exhibit on the one-to-one photograph."

In rebuttal, the state recalled Dr. Finley, who testified that he had compared the casts he had made on September 30, 1977 with the casts made by Dr. Andrews on April 29, 1978. Dr. Finley's opinion concluded that his models reproduced more accurately the gum tissues of appellant's dentition; that there was a difference in the posterior back teeth of the two models and most importantly, that the front teeth were more ragged on his casts of September 30, 1977 and that the right canine tooth had also a more pronounced point as compared with the casts of Dr. Andrews under date of April 29, 1978. Dr. Finley testified that the casts he made on September 30, 1977 were accurate reproductions of appellant's dentition as of that date.

During the trial (noon recess) Dr. Finley examined appellant's teeth in the presence of Dr. Andrews. Dr. Finley on rebuttal, testified that the casts made by Dr. Andrews reflected the present condition of appellant's teeth, but he added the change in appellant's teeth, representing the difference in the casts between September 30, 1977 and April 29, 1978, could not have occurred in such a short period of time by normal wear, but that such change could have been caused by artificial means.

Dr. Andrews was then recalled as a surrebuttal witness. He was asked that if during the trial recess in the presence of one of the state's experts, he had examined

appellant's dentition. The following reveals the evidence on this point:

"Q. During the recess at lunch in the presence of Dr. Jon Finley, did you have an opportunity to again examine the mouth of Mark Sager?

A. I did.

Q. In the presence of Dr. Jon Finley, did both of you medical witnesses compare Defendant's Exhibit 31, State's Exhibit 31 and Defendant's Exhibit 40?

A. We did.

Q. Did you reach any conclusion about whether or not there were some changes in the dentition of Mark Sager's mouth from the time of his models were taken on September 30 to the present date?

A. There were some very minor differences in the incisal edge height.

Q. Is that on the lower model or upper model?

A. On the lower dentition.

Q. You found no differences in the upper dentition?

A. No difference.

Q. Would you explain to the jury what in your opinion, your professional opinion, based on your medical expertise and your experience, what could have caused those differences?

MR. ALLRED: I object, calling for a conclusion, invades the province of the jury.

THE COURT: Objection overruled in view of the inquiry on the rebuttal.

Q. [By Mr. Brown] Based on your professional expertise and your experience and actually looking

at Mark's mouth, checking the models, can you tell this jury in your opinion what caused those changes, those minor changes that you have just spoken of?

A. Yes. The changes we are talking about are less than a half-a-millimeter, which is—with the type of rulers and equipment we are using is practically imperceptible. Now, when teeth develop and erupt, they develop little festoons on the incisal edges. There are three on each tooth. These little festoons are called mammillons, and they are part of the normal development of each tooth because labial or outside surface of each tooth develops from three centers of growth. When the tooth is in the bone and developing, when the teeth erupt it is normal for these three little ridges to be seen. They are usually most prominent on the primary dentition of young children. As we get older, we wear this, these mammillons off and this wear pattern continues for the rest of our life. When, we're under a stressful situation—[interrupted]

* * *

Q. [By Mr. Brown] Doctor, you needn't go further on that. Did you find any changes whatsoever, though, in the upper area where you have found your discrepancies?

A. No changes whatsoever.

Q. There is no change at all in that discrepancy situation.

A. No."

Upon cross-examination in surrebuttal, Dr. Andrews was asked the following questions and gave the following responses:

"Q. Doctor, the truth of the matter then is very simple: Dr. Furness was working with a different set of teeth taken at a different time than you were?

A. He was absolutely not working with a different set of teeth. There is no change whatsoever in alignment or cusp height, that's less than half-a-millimeter. These teeth were worn down because that boy was in a terrible stressful situation and that would cause wear.

Q. They were different, weren't they?

A. They were less than half-a-millimeter difference [sic].

Q. Just answer my question.

A. They were less than half-a-millimeter different.

Q. Just answer my question.

A. That's all I'm doing.

Q. Yes or no.

MR. BROWN: I object. He's arguing with the witness. The answer has been given.

THE COURT: Objection will be overruled.

Q. [By Mr. Allred] Will you answer, Doctor? There is a difference in those models, isn't there.

A. Less than half-a-millimeter.

Q. I'm not asking you that. You can tell me yes or no. There is a difference?

A. Very slight difference."

[8, 9] What the foregoing evidence reveals is that not too uncommon situation of differing expert opinions. This evidence does, however, permit this court to reach an answer regarding questions two and three above. The evi-

dence clearly established the qualifications as experts the witnesses for both parties to the instant case, enabling them to render an expert opinion. Question No. 2 is answered in the affirmative. The evidence further reveals that there was reliable and credible evidence supplying the factual basis which in turn served as the basis for rendering an expert opinion. The evidence, in addition to numerous pages of transcript of expert testimony, included more than 80 exhibits, consisting of transparencies, photos, negatives, casts or impressions of appellant's dentition and the demonstration of these exhibits before the jury. Question No. 3 is answered affirmatively.

While the experts in the instant case arrived at opposite ends of the conclusion spectrum in their interpretation of the particular evidence, one common denominator emerges from their voluminous testimony and the extensive number of exhibits. That common denominator is that forensic odontology, inclusive of bite mark identification, is an exact science. It is exact in the sense that through acceptable scientific procedures, an expert can form an opinion useful to the courts in their quest for the truth.

In turning to Question No. 1 above, this court, although the benefactor of the expertise upon this record, also bears the obligation to research still further the entire question. An appendix is attached for detailed reference to authoritative text material utilized in such research.

Research and study of the authoritative text materials by experts in the field permit the drawing of certain conclusions. The experts generally agree that forensic odontology, inclusive of bite mark identification, is an exact science; that expert skill, knowledge and training are necessary, and when acceptable techniques and pro-

cedures are adopted, an expert opinion can be postulated as an aid to the courts.

Differences existing between the experts appear to rest upon two basic points. One such difference rests upon the methodology employed. Research reveals that some experts follow the practice of making varnished dental casts, applying printers ink to the incised surface and transferring the imprint onto transport paper. This transparency would then be superimposed upon a life-size bite mark photograph for comparison. This has been referred to as the Sorup Method. Another procedure included reproduction of tissue consistency by placing bakers dough upon sponge rubber around a center pole. The dental models would then be articulated, a bite mark produced and a comparison then made. This has been referred to as the Buhtz-Erhardt method.

Another procedure, referred to as the Morgan method, consists of making models of both the bite mark and the suspect's dentition. Black paint is then applied to highlight the indentations so only the incisal and occusal surfaces remain bare. Negatives of both the bite mark and the suspect's casts are superimposed for comparisons.

Yet another method, introduced in 1968, utilizes comparison photographs of the bite mark and the suspect's casts. This method has been considered as being similar to tool mark and ballistic comparison. This method calls for:

(a) an enlarged photograph of the bite mark to be made;

(b) printers ink to be applied to the incisal aspects of the suspect's models;

(c) photographs of the front (labia) and top (occlusal) view of the casts to be made. These photographs

are printed to correspond in size with the previous enlarged bite mark photographs;

(d) the enlarged photographs of the bite mark and suspect's models to be mounted adjacent to each other on cardboard and lines to be drawn indicating similarities.

This method, referred to as the Furness method, was that followed in the instant case by the state's expert and has been hailed as an excellent method for presentation of evidence to a jury.[12]

On the question of method, one leading expert has declared, "It is important to realize that there exists no single method which must be utilized in bite mark studies . . . and the particular method or methods employed depend upon the circumstances of the individual case and the preference of the analyst."[13]

The second basic disagreement between the experts appears to rest upon the lack of a universal methodology unsupported by a core of basic data for comparison. While most experts agree that such basic core data would enhance the specificity of any given case, they also seem to agree that the absence of such data is not an element which defeats this scientific procedure. The absence of such core data was likened to the early days of fingerprinting and has been best summarized as follows:

> "The situation is comparable to the point in the distant past when the 100th set of fingerprints was classified. At that time, it was known that the set of prints did not match the ninety-nine others previously recorded but it was not known if the set of prints

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12. *Forensic Dentistry*, n. 7, *supra*.
13. *Forensic Dentistry*, n. 7, *supra*.

were specific for only the one individual fingerprinted. Today, after categorizing 84 million sets of fingerprints in the United States it can be stated with certainty that no two sets match. The present bite mark specificity is comparable to the 100th fingerprint case example."[14]

For a cogent reference as to bite mark identification, one should refer to an article by S. Keiser-Nielsen, *Forensic Odontology Cases and Comments*, Legal Medical Annual (1970); *Proof of Facts* (Annotated), 25 Am.Jur. (1970) and *Proof of Facts* (Annotated), 25 Am.Jur. (Supplement) (1979). For an interesting and informative critical analysis of why such evidence should not be admissible, see *The Admissibility of Bite Mark Evidence*, 51 So.Cal.Law Rev. (1978).

The admissibility of bite mark identification has confronted the courts before in other jurisdictions. That such evidence has been held to be admissible is seen in the following cited authorities. *State v. Garrison*, 120 Ariz. 255, 585 P.2d 563 (1978) was a murder case wherein the court admitted into evidence the conclusion of an expert witness that the probability of the bite marks on the breast of the victim were not made by the accused was 8 in 1,000,000 wherein the evidence revealed such probability was not a matter of mere mathematical calculation but was based upon articles written in journals of the *American Academy of Forensic Sciences* and other texts. *People v. Slone*, 76 Cal.App.3d 611, 143 Cal.Rptr. 61 (1978), involved a murder conviction wherein the court held the general test for determining admissibility of new scientific techniques is whether or not the thing from which the deduction is made is sufficiently established to have gained general acceptance in the particular field in which

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14. *Forensic Dentistry*, n. 7, *supra*.

it belongs. In *People v. Slone, supra,* the court held that evidence relating to bite marks had to meet the "three prong test" which provided (a) general acceptance, (b) that the witnesses providing testimony were qualified experts and (c) a demonstration that correct scientific procedures were used. This case also reaffirms California's acknowledgment of the rule in *Frye v. United Stataes, supra,* and reaffirms the rule laid down in a preceding California decision, *People v.Marx,* 54 Cal.App.3d 100, 126 Cal.Rptr. 350 (1975), which was the landmark decision on bite marks in California. *People v. Watson,* 75 Cal.App.3d 384, 142 Cal.Rptr. 134 (1977) involved a murder conviction where color slides of bite marks were held admissible to illustrate expert testimony. The case of *People v. Marx, supra,* emphasized that the bite marks on the victim's nose were held admissible, and further ruled that an accused has no constitutional right to refuse the making of a cast of his teeth.[15] *People v. Johnson,* 8 Ill.App.3d 457, 289 N.E.2d 722 (1972) involved a conviction for burglary, rape and battery wherein the court held that there was no error in recalling the dentist who had made a cast of the defendant's teeth, this cast serving as the basis for the oral pathologist's opinion that it waas highly probable that the bite marks on the victim's breast were made by defendant's teeth, although the dentist in his initial testimony had failed to identify the defendant as the person from whom the dental cast had been made, since no question as to the integrity of the exhibit or new facts had arisen and there was no dispute concerning the identity of the exhibit.

In 1976, the Appellate Court of Illinois, First Division, affirmed the bench tried conviction and sentence of 90

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15. *People v. Marx, supra,* was criticized in 51 So.Cal.Law Rev., *supra.*

to 175 years in the penitentiary regarding an accused named Richard Milone, see *People v. Milone,* 43 Ill.App.3d 385, 2 Ill.Dec. 63, 356 N.E.2d 1350 (1976). This case involved the murder of a 14 year-old girl. Her body was found with multiple wounds. A critical part of the evidence centered upon identification of bite marks found upon the victim's thigh. In all, seven dental experts testified at trial. Three experts appeared for the state. Four were presented on behalf of the defendant. These two groups of experts disagreed over the identity of the accused as the perpetrator of the bite mark. The accused challenged such evidence under *Frye v. United States, supra,* and the court ruled that such evidence was admissible. The accused further challenged the admissibility of such evidence under *People v. Jennings,* 252 Ill. 534, 96 N.E. 1077 (1974). The court, in affirming the conviction, held 2 Ill.Dec. at 70, 356 N.E.2d at 1357 that "a lack of complete unanimity in the medical profession as to the reliability of certain scientific testimony does not mean that such testimony fails to satisfy the requirements of *Frye* or *Jennings.*"

While the conviction in *People v. Milone, supra,* still stands, that was not to be the last word on the subject. One of the defense experts, Dr. Lowell J. Levine, D.D.S., claims in an article entitled *Forensic Dentistry: Our Most Controversial Case,* printed in *Legal Medicine Annual,* (1978) and written by Cyril H. Wecht, series editor, that subsequent to the Milone conviction, one Richard O. Macek, who had been charged with other rapes and murders tendered a written confession to authorities of the murder for which Milone stood convicted. It appeared that a 23 year-old mother and her 4 year-old daughter had been murdered in Crystal Lake, Illinois. Bite marks were found on the right breast of the mother. It was contended by

Dr. Levine that the bite mark on the mother, in the one case was identical to the bite mark on the thigh of the victim in the *Milone* case. The article pointed out that such a conclusion was reached by comparing dental x-rays to photographs. No dental casts were obtained because Richard O. Macek, for no apparent dental reason, had undergone a complete dental extraction. It is the contention of Dr. Levine that the bite mark on the 14 year-old victim in the *Milone* case and the bite mark on the murdered 23 year-old mother mentioned above were inflicted by the same person, to-wit, Richard O. Macek, not Richard Milone.

Niehaus v. State, 265 Ind. 655, 359 N.E.2d 513, *cert. denied* 434 U.S. 902, 98 S.Ct. 297, 54 L.Ed.2d 188 (1977) involved a murder conviction affirmed on appeal, wherein the court held that evidence comparing marks in human tissue to the teeth of a suspect was admissible even though that procedure has had limited application because it consisted of standardized procedures known to procure accurate models and measurements. *State v. Peoples,* 227 Kan. 127, 605 P.2d 135 (1980), was an appeal from the conviction for a felony murder wherein the court concluded, 605 P.2d at 139: "[B]itemark identification by an expert witness is sufficiently reliable and can be a valuable aid to a jury in understanding and interpreting evidence in a criminal case. When the witness has the requisite skill and experience, and demonstrates the accuracy and reliability of his models, photographs, x-rays and supporting exhibits in bite-mark identification, the trial court in the exercise of its power of discretion may properly admit the opinion testimony of the expert witness." *State v. Jones,* 259 S.E.2d 120 (S.C.1979) was a case which involved a conviction for kidnapping, rape, armed robbery and assault. The court affirmed the conviction and declared that the trial court did not abuse its discretion

in admitting techniques and theories of bite mark evidence where there was no showing that such techniques and theories were other than those accepted by photographic and dental communities.

Doyle v. State, 159 Tex.Cr.R. 310, 263 S.W.2d 779 (1954) was a case wherein the court affirmed a conviction for burglary and held that in requiring the accused to bite into cheese for bite mark comparison, did not constitute a confession, and evidence of bite mark comparison was held admissible. *Patterson v. State,* 509 S.W.2d 857 (Tex. Cr.App.1974) affirmed a conviction for murder (with dissent) wherein the court concluded that the admission of bite mark evidence was not violative of the 4th and 14th amendment to the Federal Constitution and that such evidence was reliable to permit its admission, citing *Doyle v. State, supra. State v. Howe,* 136 Vt. 53, 386 A.2d 1125 (1978) affirmed a conviction for murder where the court held the testimony to be admissible of an expert odontologist regarding comparison of a model of defendant's dentition with photographs of bite marks on the body of the victim notwithstanding the claim by the accused that the state had failed to establish that the metric scale used in enlargement to life size of photograph of victim's lacerated breast exactly matched the actual metric scale which appeared in the photograph itself. The case of *State v. Rough,* 30 Or.App. 901, 568 P.2d 704 (1977), affirmed a conviction for rape where the court ruled that the trial court did not abuse its discretion in admitting testimony of a dentist as to the similarity of bite marks on the victim's neck and one of defendant's teeth.

[10] In our courts, the determination of admissibility of expert testimony vests largely in the discretion of the trial court, and the exercise of that discretion will not be disturbed on appeal unless an abuse of such discretion is shown, see *State v. Arnold,* 574 S.W.2d 1, 3 (Mo.App.

1978), citing *State v. Cook*, 557 S.W.2d 484 (Mo.App.1977). See also *State v. Carter*, 591 S.W.2d 219 (Mo.App.1979).

Our courts follow the rule in *Frye v. United States, supra*, see *State v. Stout*, 478 S.W.2d 368, 369 (Mo.1972), wherein our State Supreme Court applied such rule in denying the admission of a neutron activation analysis of blood as evidence for purposes of the identification of blood samples. At this juncture, one additional authoritive text quotation finds application to the instant case:

> "In summary, bite mark comparison results may represent varying degrees of incriminating evidence which must be so designated by the dental expert so that the court or jury can apply the weight of the evidence in proper perspective to the total circumstances surrounding the trial. The defense counsel may attempt to totally exclude the admission of bite mark evidence on the basis of its credibility. Such action merely eliminates a valuable segment of evidence offered to arrive at the truth. The methods of bite mark comparison are based on scientific principles as advanced as the current state of the art. Such evidence should not be suppressed if one wishes to pursue the totality that can be afforded by medicolegal evidence in search of truth."[16]

[11] In summary then, as regards appellant's point two, the court has painstakingly plowed through the record herein and through voluminous legal and dental authorities as well to arrive at the following conclusion. Such emphasis and approach was undertaken because the issue of admissibility of bite mark evidence presents itself for the first time of record in our state. Based upon consideration of all the foregoing factors, Question No. 1 above is answered affirmatively.

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16. *Forensic Dentistry*, n. 7, *supra*.

Returning specifically to appellant's point two, it is found herein, based upon the evidence, that authority from other jurisdictions and from supplemental text and research materials, that the science of positive bite mark identification has reached the level of scientific reliability and credibility to permit its admission as evidence in criminal proceedings.

In addition, the evidence herein clearly establishes that the witnesses who testified for both parties were, in fact, sufficiently qualified as experts to offer and state their opinions upon the issue of identity of the perpetrator of the bite mark on the victim's body. Further, it is found that the factual basis upon which the expert opinions were rendered herein was supported by reliable and credible evidence.

[12] There was no error by the trial court in the admission of such scientific and expert evidence. The weight and sufficiency was for the jury to determine.

For the foregoing reasons, point two, in its entirety, is ruled against appellant.

As his third point of alleged error, appellant contends the trial court erred in the submission of Instruction No. 8 in that this instruction failed to state, with particularity, the time of death of the victim. This instruction reads: "If you do not find the defendant guilty of capital murder or murder in the first degree or murder in the second degree then you must consider whether he is guiulty of manslaughter.

If you find and believe from the evidence, beyond a reasonable doubt that on or about the 2nd day of September, 1977 in the County of Platte, State of Missouri, the defendant caused the death of Julie Wittmeyer by stabbing and cutting her.

Then you will find the defendant guilty of manslaughter.

However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing then you must find the defendant not guilty of that offense." (MAI-CR 15.18—underlining added by this court).

Appellant's defense was alibi and he argues that upon informing the state that he would rely upon such defense, the state had relied by stating that the death of the victim occurred between 3:30 and 5:00 p. m. on September 2, 1977. With this being the posture of charge and defense, appellant argues that it was necessary to submit the time period to the jury to prevent the jury from finding appellant guilty even though death occurred at a time other than the time specified to appellant.

Appellant further argues the record is void of evidence to support any finding of death between the hours of 3:30 p. m. and 5:00 p. m., therefore, it must follow that no evidence existed to warrant a finding of guilty under an appropriate instruction.

[13] Cited for the court by appellant are cases which have established that time may be of importance when alibi defenses are relied upon. See *State v. Tettamble,* 394 S.W.2d 375, 379 (Mo.1965), vacated and remanded on other grounds, 386 U.S. 265, 87 S.Ct. 1034, 18 L.Ed.2d 42 (1967), on remand, 431 S.W.2d 441 (Mo.1968), appeal after remand, 450 S.W.2d 191 (Mo.1970), where the court held as a rule that ". . . time is not of the essence of the offense of homicide." Therefore, a specific time need not be included in jury instructions. However, as noted by appellant, instructions may be required to include a finding as to the time of the act causing death. This requirement may arise because "time may be of 'decisive importance' even though not of the 'essence' of the offense" when evidence of an

alibi is introduced, see *State v. Clark*, 509 S.W.2d 740, 743 (Mo.App.1974). See also *State v. Siems*, 535 S.W.2d 261, 266 (Mo.App.1976) and Paragraph 4, "Notes on Use", MAI-CR 15.00.

Appellant argues for the exception made in cases, where alibi defenses are introduced. Appellant cites *State v. Siems, supra,* at 266:

> "Except where time is of the essence, it is not error to give an instruction that submits the happening of the offense at anytime within the limitation period. . . . (citations omitted) Time is not of the essence in a crime of the nature here considered. However, the State has the burden of proof to establish the presence of the accused at the time and place of the offense. Therefore, when an alibi defense is interposed, time may be of decisive importance even though not of the essence of the offense . . . (citations omitted) With the foregoing principles in mind, we find that the instruction given was not error. When a specific date is presented as the date of the alleged crime, an instruction covering a broad period of time may not be given which would nullify an alibi defense supported by substantial evidence."

Those cases which have required a more specific time period to protect the use of an alibi defense "announce a rule of fundamental fairness that when an alibi is interposed, the time span within which the crime is alleged to have occurred must not be such as to place an impossible burden on the defendant to offer evidence of his whereabouts over an extended period of time," see *State v. Clark, supra,* at 743. In *State v. Clark, supra,* the accused was charged wtih sodomy. The information specified a certain day and the instruction specified the same day for and as the date of the offense. The accused argued that

unless the time be stated with particularity, he would not be able to meet the charges with a defense of alibi. The court concluded that the information was sufficient, reasoning that the accused was made aware of the date. The state had gone one step further and notified the accused that proof would be limited to 3:00 p. .m. to "suppertime". The court concluded that the accused did have sufficient notice to prepare his defense of alibi. The court reasoned further that instructions need not allege the precise time of the offense since the instructions required a finding that the offense occurred on that particular day.

In *State v. Siems, supra,* the court upheld an instruction which only specified the offense occurred "during the month of February". The victim could not remember precisely when the offense occurred, but the court reasoned that the instruction sufficiently limited the time of the offense to the facts testified to by the victim.

The instant case, as in *State v. Clark, supra,* shows appellant was charged with having committed the offense on or about (September 2, 1977) a specified date, appellant herein was aware prior to trial that the evidence would focus on the time of 3:30 p. m. to 5:00 p. m. and appellant was given ample opportunity to prepare his alibi defense. The evidence herein showed that the victim had been seen alive at approximately 3:20 p. m. on September 2, 1977. According to the pathologist, death could have occurred between 24 and 72 hours preceding the autopsy performed at 1:30 p. m. on September 4, 1977. Therefore, contrary to appellant's contention, the evidence does support a finding that death occurred between 3:30 p. m. and 5:00 p. m. on September 2, 1977. Additional evidence dispels appellant's contention. Witnesses testified to having seen a car similar to that owned by appellant on HH Highway and Interurban Road around 3:30

to 3:45 p. m. on September 2, 1977. Road tests were presented, which showed that the crime could have been committed during the time appellant left his job until his arrival at his home. It was further argued that when appellant's friends arrived at appellant's home, the hood of appellant's car was still hot as if the motor had just been turned off.

In his alibi defense, appellant described his route home from work. He stated he arrived home around 4:00 p. m.

[14] The evidence before this jury clearly contrasted the time of the offense and the alibi defense of appellant. This is not a case where the jury could believe the appellant was where his alibi defense and corroborating witnesses placed him and still believe the appellant commiitted the crime. As a result of this contrast in the evidence, Instruction No. 8 did not nullify appellant's alibi defense, see *State v. Graves,* 588 S.W.2d 495 (Mo.banc 1979).

The state channeled its proof to events between 3:30 and 5:00 p. m. Appellant produced his own statement, along with testimony from supporting witnesses, thus developing his whereabouts from 3:30 to 6:00 p. m. The weight and sufficiency of the evidence upon this question was for the trier of fact. The instruction, however, contrary to appellant's contention, was sufficiently precise to allow appellant to avail himself of an alibi defense. The questioned instruction neither nullified the alibi defense nor placed an impossible burden upon appellant to offer evidence of his alibi defense.

For the foregoing reasons, point three is ruled against appellant.

Appellant, for his alleged error (point four), declares the trial court erred as a matter of law in giving Instruc-

tion No. 8[17] because there was no evidence to support such instruction and no credible evidence existed to support a finding of the crime of manslaughter.

Instruction No. 8 is in absolute conformity to MAI-CR 15.18 and the giving of same was mandatory upon the trial court, see Paragraph (2), Notes on Use, MAI-CR 15.18; *State v. Stapleton,* 518 S.W.2d 292 (Mo.banc1975); *State v. King,* 577 S.W.2d 621, 623 (Mo.banc1979) (reaffirming *State v. Stapleton, supra*).

This court is bound to follow the mandate of our State Supreme Court under the *State v. King, supra,* decision. See also *Stephens v. State,* 583 S.W.2d 282 (Mo.App.1979); *State v. Hegwood,* 558 S.W.2d 378 (Mo.App.1977) and Mo. Const., Art. V, § 2.

Appellant concedes the mandatory requirement of MAI-CR 15.18 but argues that the instant case was at all times tried and defended upon the theory of capital murder, and no defense or evidence was offered as to mitigate the offense or the charges. Appellant argues that under *State v. Ryan,* 492 S.W.2d 116 (Mo.App.1973) with manslaughter being a residual offense to murder, a conviction for manslaughter absent any evidence to support such lesser conviction cannot stand. This court does not find *State v. Ryan, supra,* controlling because in that case the accused, under the evidence, was entitled to an instruction on manslaughter.

Appellant further contends that the evidence herein supported only a conviction for the higher offense of murder and hence, since he was convicted of manslaughter, his conviction cannot stand.

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17. The precise wording of Instruction No. 8 has been set forth earlier in this opinion.

Appellant raises the question of the sufficiency of the evidence on this point. Under *State v. Ellinger*, 549 S.W. 2d 136 (Mo.App.1977) such attack is to be treated as a motion for judgment of acquittal at the close of all the evidence.

In the instant case, appellant filed an after-trial motion for judgment of acquittal notwithstanding the verdict which was overruled.

The evidence contained in this record is sufficient to warrant a finding that appellant caused the death of the victim by stabbing and cutting her pursuant to Instruction No. 8 set forth above.

[15] Appellant seems to argue that since the evidence was so abundant that the jury could have found appellant guilty of capital murder, it was bound only to reach that form of conviction and none other. It should be pointed out that the evidence was sufficient to sustain a conviction for capital murder, but it is also correct that the evidence was sufficient to sustain a conviction for manslaughter, and the jury was not bound to make a finding upon capital murder exclusively, see *State v. King, supra.*

The trial court properly instructed the jury pursuant to MAI-CR 15.18 and this court is bound by the authority interpreting the giving of such an instruction as a required instruction.

Point four is ruled against appellant.

[16] For his final alleged error, appellant attempts to preserve every point in his motion for new trial. In this court's attempt to decipher precisely what it is appellant alleges as error, said alleged error is reduced to only one discernible issue. Appellant alleges the trial court erred as a matter of law in its failure to grant appellant

a new trial. The reason given is the failure of the prosecutor to timely disclose fully the evidence that was ordered disclosed by the trial court. Such failure is alleged to have been prejudicial. This describes one contention under this alleged error.

The remainder of the final point of error is the attempted generalized preservation of all the points of error assigned in appellant's motion for new trial. Such generalization contends a violation of state and federal constitutional guarantees.

Turning first to the latter portion of appellant's contention, it is found to be without merit upon his failure to properly preserve any point or points for review, plus the complete absence of any argument in support of such allegation.

[17] On appeal, the reviewing court does not review points raised in a motion for new trial, which are neither briefed nor argued. When an appellant fails to brief or argue any such point, such point is deemed to be waived, see *State v. Heitman,* 473 S.W.2d 722 (Mo.1971); *State v. Sykes,* 436 S.W.2d 32 (Mo.1969) and *State v. Brown,* 527 S.W.2d 15 (Mo.App.1975), reversed on other grounds, 549 S.W.2d 336 (Mo.banc1977). See also Rule 28.02.

As a final note on this segment of appellant's final alleged error, since appellant expressed some apprehension over the length of his brief (113 pages), this court nonetheless reviewed the transcript relative to these broad assertions and finds they are without merit.

Returning to the remaining segment of appellant's final alleged error, this court finds that appellant on his motion for new trial, and now on appeal, alleges deliberate refusal and failure by the state to comply with the rules of discovery. It is specifically argued that the prosecu-

tion failed to obey the trial court order for discovery under date of December 16, 1977 and again at subsequent court appearances. The item serving as the subject of this contention is a report, dated October 13, 1977, from the state's witness Dr. Lester Luntz. This report, set forth below, of course relates directly to the identification of appellant as the perpetrator of the bite mark. The report, which is in the form of a letter, reads as follows:

> "Dear Sheriff Thomas:
>
> Enclosed are two copies of my initial dental report on the bite mark photographs and the models. With twenty one points of comparison I am of the professional opinion, with reasonable medical certainty, that the teeth of Mark Sager made the bite mark on the right breast of Julie Whittmeyer [sic]. I will continue to do more research on this case.
>
> Sincerely,
>
> /s/ Lester L. Luntz D.D.S."

In the discovery phase of this trial, appellant deposed Dr. Luntz and in that deposition, appellant argues, Dr. Luntz made the following contradiction: "There are no discrepancies in the photograph of the bite-mark and the dentition of Mark Sager to exclude him as the perpetrator of the bite-mark."

In the first instance, this court finds difficulty in agreeing with appellant's contention that the context of the letter and the testimony of Dr. Luntz in his deposition are contradictory. Be that as it may, the real issue is whether the record in this case supports appellant's contention that the prosecutor failed or refused to comply with the order of the trial court as to discovery.

Additionally, appellant contends that the prosecution refused to comply with the discovery order in withholding dentitions taken from appellant on September 16 and September 30, 1977.

Referring first to the Luntz report, the record herein fails to support appellant's claim of the prosecution's refusal to comply with the court's order for discovery. It must be remembered that appellant deposed Dr. Luntz (this deposition was never part of the court record). Furthermore, the record herein reflects the report, of which appellant complains, was in fact first alluded to upon cross-examination of Dr. Luntz by appellant. There is nothing in the record of this case which permits this court to determine what conclusions were or might have been drawn by Dr. Luntz in his deposition. On the other hand, the record clearly shows appellant was aware of the report and, in fact, made use thereof by way of cross-examination of Dr. Luntz. The prosecution never offered this report and the record reveals, from whatever source, appellant was fully aware of its existence and content prior to trial.

[18] This court cannot assume facts or evidence not found upon the record, and it cannot assume facts presented as mere allegations on appeal, see *State v. Hatten*, 561 S.W.2d 706 (Mo.App.1978) and *State v. Collett*, 526 S.W.2d 920 (Mo.App.1975).

[19] Appellant's contention concerning the report of Dr. Luntz, and the alleged refusal or failure of the prosecution to comply with the trial court's order for discovery regarding this report, has no evidentiary support upon this record and is found to be without merit. This record reflects no objection by appellant on the ground of surprise or failure to comply with discovery. Appellant challenged the testimony of Dr. Luntz on improper chain of custody, the background of Dr. Luntz and his qualifications, and

the lack of scientific acceptance of such testimony. Concerning appellant's contention that the prosecution refused or failed to comply with the trial court's order for discovery regarding appellant's dentitions of September 16, 1977 and September 30, 1977, the record is devoid of any objection by appellant at trial that the prosecution failed to make available the dentitions and that the prosecution failed to comply with the order for discovery.

Of particular interest on this point is the position of appellant following the motion to suppress. The record reveals concern over the voluntariness of appellant in permitting the dentitions to be made and the questioning of such evidence being scientifically reliable. Prior to trial, appellant was apprised of the two dentitions. No objection was made to the introduction of the dentitions upon trial and upon allegations of refusal or failure to comply with the court's order for discovery. Objection was directed to the chain of custody and nothing further. The record further reveals that three of these dentitions were, in fact, never used by the expert witness and hence, were not permitted as evidence by the trial court. The record reveals that appellant's expert witness has access to the photographs and dentitions prior to trial.

In addition, the record fails to reflect any effort by appellant to secure sanctions by the trial court for failure or refusal to comply with the court's discovery order. Rule 25.45 empowers the trial court to employ a variety of ways to enforce its discovery orders, and the imposition of such sanctions is within the trial court's discretion after the court determines sanctions are warranted, see *State v. Couch*, 569 S.W.2d 789 (Mo.App.1978). Also see *State v. Crow*, 486 S.W.2d 248 (Mo.1972) for the rule that no error lies for failure of the trial court to not rule on anything not brought to its attention. There is nothing in-

cumbent upon a trial court on its own motion to enforce its order for discovery. The parties are left to their option under the rule to seek the aid of the trial court to force the aggrieving party to comply. This record is devoid of any objection to the particular evidence upon failure or refusal to comply with the order for discovery and moreover, the record is totally silent on the matter of appellant, that is, the fact of whether or not he felt threatened, surprised or prejudiced in any manner to seek the assistance of the trial court in enforcing its order of discovery. This trial, including the numerous pretrial motions, proceeded to its end and afterwards, appellant alleges failure or refusal to comply with the discovery order. There is no evidence to support appellant's contention.

[20] This court is not unmindful of its inherent power to review this point pursuant to Rule 27.20 for plain error. A determination of plain error is predicated upon manifest injustice or a miscarriage of justice, resulting in prejudice to an accused. Consideration of the entire proceedings upon this record leads to the conclusion that no plain error arose in this case.

Appellant, from the outset, was ably presented by counsel. A vigorous, constant assault upon the evidence commenced at appellant's motion to suppress and continued throughout the trial. Appellant was, throughout these proceedings, apprised of the prosecution's evidence to the point that such claimed evidence directly reflected upon the guilt of appellant.

There is no evidence which shows appellant was ever misled or surprised during this trial which in any manner led to the prejudice of the rights of appellant.

Point five for the foregoing reasons is ruled against appellant.

The length of this opinion reflects the extensiveness of the record herein, inclusive of the multitude of exhibits. More importantly, it is hoped the length and breadth of this opinion reflects the importance of the issue, not only of the trial of this appellant, but the issue of bite mark identification as a means of evidence in criminal proceedings.

Appellant was charged with capital murder. He was ably represented by counsel, who presented a vigorous defense on his (appellant's) behalf at every step in the proceedings. The trial court was attentive to all segments of the trial proceedings, especially as to the introduction of evidence. The rulings made thereon were proper. A jury of appellant's peers found appellant guilty of manslaughter. It was left to the trier of fact to weigh the evidence and determine the credibility of the evidence and the witnesses upon trial in arriving at the verdict.

This court finds no error in the trial of this case and for the foregoing reasons, Points I, II, III, IV and V alleged as error are ruled against appellant. The judgment herein is in all respects affirmed.

All concur.

APPENDIX A

1) W. Harvey, *Dental Identification and Forensic Odontology* (1976)

2) *The Criminologist* (N. Morland ed. 1971)

3) C. Hirsch, R. Morris & A. Moritz, *Handbook of Legal Medicine* (5th ed. 1979)

4) *Legal Medicine Annual 1978* (C. Wecht ed. 1979)

5) L. Siegal, *Forensic Medicine* (1963)

6) *Gradwohl's Legal Medicine* (2d ed. F. Camps 1968)

7) I. Sopher, *Forensic Dentistry* (1976)

8) L. Luntz, *Handbook for Dental Identification* (1973)

9) Cameron & Sims, *Forensic Dentistry* (1973)

10) Gladfelter, *Dental Evidence: A Handbook for Police* (1975)

11) Beckstead, Rawson & Giles, *Review of Bite Mark Evidence*, 99 JADA 69-74 (1979)

12) Horne, *A Case of Bite Marks*, 4 *Chronicle, Omaha District Dental Society* 72 (1977)

13) Mertz, *Forensic Dentistry Today*, 71 *CDS Review* 21-24 (1973)

14) *Legal Medicine Annual* 1970 (C. Wecht Ed. 1971)

15) Hanley, *Some Aspects of Forensic Dentistry*, 70 *Proc. Roy. Soc. Med.* 263,264 (1977)

16) Levine, *Denistry, An Emerging Forensic Science*, 72 *New York State Journal of Medicine* 820-822 (1972)

17) Luntz & Luntz, *A Care in Forensic Odontology: A Bite-Mark in a Multiple Homicide*, 36 *Oral Surgery* 72-78 (1973)

18) Goodbody, Turner & Turner, *The Differentiation of Toothed Marks: Report of a Case of Special Forensic Interest*, 16 *Med. Sci. Law* 44-48 (1976)

19) Vale, Sognnaes, Felando & Noguchi, *Unusual Three-Dimensional Bite Mark Evidence in a Homicide Case*, 21 *Journal of Forensic Sciences* 642-652 (1975)

20) Woolridge, *Legal Problems of the Forensic Odontologist*, 18 *Journal of Forensic Sciences* 40-46 (1972)

21) Dinkel, *The Use of Bite Mark Evidence as an Investigative Aid*, 19 *Journal of Forensic Sciences* 535-547 (1973)

22) Stoddart, *Bite Marks in Perishable Substances*, 135 *British Dental Journal*, 285-287 (1973)

23) Bang, *Analysis of Tooth Marks in a Homicide Case*, 34 *Acta Odontologica Scandinavica* 1-11 (1976)

24) W. Curran, A. McGarry & C. Petty, *Modern Legal Medicine, Psychiatry, and Forensic Science* (1980)

25) L. Adelson, J. Faust, C. Hirsch, O. Schroeder & D. Scott, *Medicine, Dentistry and Law, A Partnership for Criminal Justice: Identification of the Murder Victim* (1977)

26) Hale, *The Admissibility of Bite Mark Evidence*, 51 *Southern Cal.Law Review* 309-334 (1978)

27) Whittaker, *Some Laboratory Studies on the Accuracy of Bite Mark Comparison*, 25 *International Dental Journal*, 166-171 (1975)

28) Levine, *Bite Mark Evidence*, 21 *Dental Clinics of North America*, 145-158 (1977)

29) Barbenel & Evans, *Bite Marks in Skin—Mechanical Factors,* 14 *Journal of Forensic Science* 235-237 (1974)

30) MacDonald, *Bite Mark Recognition and Interpretation,* 14 *Journal of Forensic Science* 229-233 (1974)

31) Levine, *Forensic Odontology—Identification by Dental Means,* 22 Australian Dental Journal 481-487 (1977)

32) MacDonald & MacFarlane, *Forensic Odontology,* 3 *Glasglow Dental Journal* 16-19 (1972)

33) Sognnaes, *Forensic Oral Measurements, Dental Survey* 12-24 (1978)

34) Luntz & Luntz, *Landmark Decision Involving a Bite Mark,* 2 *Dental Dimensions,* 7-9 (1978)

35) *Standardization of Bite Mark Evidence,* a report by Sgt. Robert Wilson, Laboratory Supervisor, Dupage County Sheriff's Department, Wheaton, Illinois

APPENDIX B

1) Stephen C. Warlen: Training at the Kansas City Police Department in checking physical evidence; one forty-hour course in evidence technology; two hundred hours at FBI Academy in police lab photography and latent print photography.

2) Dr. Jon Finley: Graduate of University of Illinois Dental School in 1967; interned in the U.S. Public Health Service in Stanton Island; Staff dentist for Public Health Service for two years; resident at Veterans Administration Hospital in Leavenworth and University of Missouri in prosthodontics for two years; currently teaches fixed prosthodontics at the University of Missouri, Kansas City, to undergraduate and graduate students; currently gives post-

graduate courses to other dentists; engaged in private practice.

3) Dr. Lester Luntz: Graduate of the University of Pennsylvania School of Medicine in Philadelphia, Pennsylvania; post-graduate training courses nearly every year since 1949, many of which have been on forensic dentistry; engaged in private practice as well as forensic dentistry—lectures in forensic dentistry at Connecticut State Police Training Academy; member of Hartford Dental Society, Connecticut State Dental Association, American Dental Association, American Academy of Forensic Sciences, Forensic Science Society of London, International Society for Forensic Odonto-Stomatology, as well as other professional organizations; recipient of various dental and forensic odontology-related awards; author of a great many journal articles as well as one book on forensic odontology, *Handbook for Dental Identification.*

4) Dr. John Furness: Graduate of the University of Durham, qualified as a licentiate in dental surgery; engaged in private practice with a specialty of 19 years in forensic odontology; currently consultant dental surgeon in forensic odontology to the Home Office Northwestern Forensic Science Laboratory in Chorley, Lancashire, consultant dental surgeon to Police Region 1 covering England and Wales; lecturer in forensic odontology to the University of Liverpool; member of British Academy of Forensic Sciences, Forensic Science Society, Odontological Society, British Dental Association, and a host of other professional organizations; licensed to practice dental surgery in England, Scotland, Wales and Ireland; author of many articles on various topics, including forensic odontology and bite marks; lecturer at many universities on bite marks and forensic odontology.

5) Roger Summers: Five years expert police photographer at New Scotland Yard, London; ten-week training school as Senior Scenes of Crime Officer with training in police photography, fingerprints, and forensic science; Duke of Edinburgh Gold Medal for photography; member International Fingerprint Society, International Forensic Science Society; lectures before bobbies within police service, and to outside professional bodies and photographic circles and scientific symposiums.

6) Dr. Edwin Everett Andrews: Bachelor of Science Degree from Syracuse University, 1956, Fairleigh Dickinson University Dental School in New Jersey, 1963, Master's Degree in Education in 1976 from Central State University in Oklahoma; currently private practitioner with specialties in prosthodontist and maxillofacial prosthodontist; one year internship at Upstate Medical Center in Syracuse, New York; two year residency in prosthodontics; past associate professor of prosthodontics at the University of Oklahoma College of Dentistry; currently a diplomat of American Board of Prosthodontics, and American Board of Forensic Odontology; consultant to the Office of Chief Medical Examiner for the State of Oklahoma, consultant to Federal Aviation Administration in Oklahoma City for forensic odontology; member of various faculties; holds Oklahoma license to practice dentistry and specialty license in prosthodontics; holds Missouri certificate to practice dentistry; holds New York and New Jersey license to practice dentistry; currently member of American Academy of Forensic Sciences, American Society of Forensic Odontology, and various other organizations; past professor and faculty member at University of Oklahoma College of Dentistry, University of Missouri, Kansas City, State University of New York College of Medicine, Onondaga Community College in Syracuse, New York; has had graduate courses and experience in pathology.

APPENDIX B

Supreme Court No. 62292

IN THE SUPREME COURT OF MISSOURI
Western District No. 30389

May Session 1980

TRANSFER

State of Missouri,
Respondent,

vs.

Mark E. Sager,
Appellant.

Now at this day, on consideration of Appellant's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied. Higgins, J. not participating.

STATE OF MISSOURI—SCT

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1980, and on the 15th day of July 1980, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of July 1980.

/s/ Thomas F. Simon Clerk.
by /s/ Anne Beihoist D. C.

APPENDIX C

IMPORTANT NOTICE

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

DATE: 6-9-80

IN RE: State v. Mark Sager

KCD# 30389

Appellant Motion for rehearing overruled.

Transfer to Supreme Court denied. See Rule 83.03.

Appellant's motion to withdraw arrest warrant and to continue on appeal bond overruled.

12 Mary Louise Thomaas, Clerk

cc: Roy Brown Phil Koppe Earl Brown

APPENDIX D

MOTION TO SUPPRESS EVIDENCE AND MOTION TO DISMISS

COMES NOW defendant, Mark E. Sager, in person and by and through his attorney, Roy W. Brown, and moves the Court to suppress the evidence in the above entitled cause and in support thereof states and alleges as follows:

1. Defendant is charged with violation of Missouri Revised Statutes, 1969, as amended, Section 565.001 with the crime of capital murder.

2. That any seizure of physical evidence and any statements (oral or written) taken from defendant were made in violation of and contrary to law in that:

(a) Said seizure was made without a search warrant having been issued in the manner prescribed by Article 1, Section 15, of the Constitution of the State of Missouri, 1945, and without other lawful authority.

(b) That at the time of said seizure, no misdemeanor or overt act was being committed in the presence of the arresting officers nor was the defendant reasonably suspected of having committed any felony.

(c) That prior to defendant's arrest (October 1, 1977) the Metro Squad by and through their officers, agents and servants fraudulently obtained from the defendant certain plaster casts of teeth impressions in the following particulars, to-wit:

(1) Failed to advise the defendant that he was a prime suspect in the investigation of the murder of Julie E. Wittmeyer occuring on September 2, 1977.

(2) Fraudulently informed defendant and his parents that the teeth impressions were taken merely for the purpose of "clearing" defendant from any suspicion.

(3) Fraudulently represented to the defendant their purpose in taking said impressions and therefore defendant did not understandably, knowingly and lawfully waive his right to deny said investigative body said impressions.

(d) That certain statements, oral and/or written, alleged to have been taken from defendant on October 1, 2 and 5, 1977 (but not limited to said dates) were taken unlawfully without defendant being properly advised of his rights as per the Miranda Rule. Said statements were taken after defendant had been charged, arraigned and after his attorney, Roy W. Brown, had unequivocally advised the Metro Squad that all interrogation should cease.

3. That the results, conclusions and opinions of Irl Gladfelter, D.D.S., Lester L. Luntz, D.D.S. and John Furness, D.D.S. are based upon illegally obtained evidence and unreliable exhibits. Further, said results, conclusions and opinions have not been shown to be scientifically reliable and therefore are inadmissible into evidence.

4. All of the above actions are in violation of and contrary to Article 1, Sections 10, 15 and 19 of the Constitution of the State of Missouri and Amendments IV, V and XIV of the Constitution of the United States.

WHEREFORE, for reasons set out above, defendant prays for an Order of this Court suppressing all of the evidence as requested in this Motion and to dismiss said Indictment and discharge defendant.

[Signature Omitted]

FILED:
Boone County
MAR 2 1978
Janet Davis
Clerk, Circuit Court
Columbia, Mo.

APPENDIX E

MOTION FOR JUDGMENT OF ACQUITTAL OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

COMES NOW defendant in person and by his attorney, Roy W. Brown, and files his Motion for Judgment of Acquittal or, in the Alternative, Motion for New Trial, and in support thereof states and alleges as follows:

1. That on June 1, 1978 the defendant was found not guilty by a Boone County Circuit Court jury of the crime of capital murder, first degree murder and second degree murder, and was found guilty of the crime of manslaughter.

2. That the Court erred as a matter of law in failing to sustain defendant's Motion to Dismiss filed immediately following the prosecution's opening statement and refiled as a part of defendant's Motion to Dismiss and Judgment of Acquittal at the close of the State's evidence and again refiled at the close of all the evidence in the following particulars, to-wit:

(a) That the defendant, Mark E. Sager, was illegally interrogated on September 14, 15, 16 and 17, 1977, as to his whereabouts on September 2, 1977 (the alleged date of death of Julie Wittmeyer).

(b) That certain models and photographs were taken of the defendant's teeth on September 16, 1977, without proper authority or consent.

(c) That on September 30, 1977, the Metro Squad obtained tooth models, photographs and statements illegally and fraudulently from the defendant in the following particulars, but not limited thereto, to-wit:

(1) Did not inform the defendant that he was a suspect in the Wittmeyer homicide.

(2) That said officers fraudulently and untruthfully told defendant and his parents that the tooth models taken heretofore were faulty. That without fully informing defendant or his parents of the use to be made from said models and photographs a knowing and intelligent consent could not be given to the taking of said photographs, models, etc.

(d) That defendant was unlawfully and illegally arrested on October 1, 1977, without a Warrant for his arrest or sufficient probable cause.

(e) That defendant was unlawfully and illegally interrogated on October 1, 1977, October 2, 3, 5 and 6, 1977 as more fully set out in defendant's Motion to Suppress Evidence filed heretofore in the following particulars, to-wit:

(1) Defendant was not properly advised of his Miranda rights.

(2) That after obtaining the services of attorney, Roy W. Brown, investigating officers continued to interrogate defendant even though he had personally expressed a desire not to be interrogated further. Further, the investigating officers were unequivocally advised that all interrogation of defendant should cease without the presence and advice of his attorney, Roy W. Brown.

(f) Defendant was unlawfully and illegally charged by grand jury indictment on October 25, 1977, in the following particulars, to-wit:

(1) The grand jury was improperly, illegally and improvidently selected as more fully set out in Defendant's Motion to Quash Indictment filed heretofore.

(g) That defendant was improperly, illegally and prejudicially denied a bond hearing on October 28, 1977.

(h) That the Judge of the Circuit Court of Platte County, Missouri, improperly, illegally and prejudicially ordered that defendant be sent to the custody of the Division of Mental Diseases for examination. That said order was made against the defendant's will and after the Court had been advised that mental incompetency or insanity would not be raised as a defense to the charge in the Indictment. That said order was made without notice to the defendant and without the presentation of evidence to sustain said order.

(i) That the transfer of the defendant to the custody of the Division of Mental Diseases, Fulton, Missouri, improperly, illegally and prejudicially denied defendant the access, aid and assistance of his counsel at a very crucial stage of the preparation of his defense.

(j) That said act of transferring the defendant to Fulton, Missouri, at the State's request, was an unlawful and deliberate attempt to continue an illegal and prejudicial interrogation of defendant.

(k) That defendant was improvidently and illegally denied a hearing on a Writ of Habeas Corpus filed by the defendant in the Missouri Court of Appeals, Kansas City District.

(l) That defendant was improvidently and illegally denied a hearing on a Writ of Habeas Corpus filed by the defendant in the Supreme Court of Missouri.

(m) That defendant was unlawfully and illegally deprived of the aid and assistance of his counsel during his incarceration by the Division of Mental Diseases by Court Order entered on December 16, 1977.

(n) That defendant was prejudicially denied discovery pursuant to Supreme Court Rule 25, et. seq., by the deliberate acts and failure to act of the prosecuting

attorney, Owens Lee Hull, Jr., in complying with the orders of the Court granting defendant discovery in the following particulars, but not limited thereto, to-wit:

(1) Delivery of Transcript of the grand jury proceedings to defendant was unduly delayed.

(2) The prosecutor deliberately withheld photographs, models and other evidence used by alleged experts in the following particulars, to-wit:

(i) That even though ordered by the Court, on December 16, 1977, to specifically communicate all reports, oral, written or otherwise, and other paraphernalia used by said experts with reference to the tooth models of the defendant, the prosecuting attorney, Owens Lee Hull, Jr., knowingly and unlawfully withheld a report written on October 13, 1977 by one Lester L. Luntz, D.D.S., an alleged expert.

(3) That the prosecutor, Owens Lee Hull, Jr., deliberately misinformed the Court and defendant's counsel of the whereabouts of the tooth models of the defendant and to date has failed and refused to deliver said models to the attorneys for defendant for inspection and examination.

(4) That the defendant was deliberately and prejudically misled in his preparation for trial by the ambiguous conclusion of the opinion of Lester L. Luntz, D.D.S. delivered to defendant's counsel by the prosecutor, Owens Lee Hull, Jr., on December 16, 1977, and the failure to deliver to defendant's counsel a report written on October 13, 1977 by Dr. Luntz.

(o) That said acts in Paragraph (n) Subsections (2) (i) and (4) prejudicially misled defendant's counsel in his decision as to whether or not to hire an expert in

the field of forensic odontology to testify on the behalf of said defendant.

(p) That the defendant was unlawfully and illegally and prejudicially hampered in his defense by the failure of the Judge of the Circuit Court of Platte County, Missouri, John M. Yeaman, to grant bond as per a hearing on January 24, 1978, wherein the prosecutor totally failed to produce sufficient evidence of the defendant's involvement to deny said bond. That the only testimony considered by the Court was that of the three alleged experts used by the State.

(q) That the defendant was prejudicially hampered by granting the State a continuance on March 9, 1978, on Application of the State, granting a continuance on the basis that one Neil E. MacFarlane, Office of the Attorney General, was getting married. That in truth and in fact there was no intent of said Neil E. MacFarlane to try said case as evidenced by the later appearance of one, J. Paul Allred, of the Office of the Attorney General.

(r) That defendant's preparation for trial was unduly hampered and delayed by the failure of the Judge of the Platte County Circuit Court, John M. Yeaman, to timely rule on Motions filed by the defendant, i.e. Motion to Suppress Evidence, Motion to Quash Indictment, etc.

(s) That the defendant was prejudicially delayed and hampered in his preparation for trial by the failure of the State to produce Marion Beeler, head of the Metro Squad during the investigation of the homicide of Julie Wittmeyer, as evidenced by said Marion Beeler's refusal to appear on March 31, 1978 and April 12, 1978 thus forcing defendant's counsel to seek a Court Order for production of said witness.

(t) That the defendant was unduly prejudiced and hampered in his preparation for trial by the acts of the

prosecutor in seeking expert witnesses far removed from this jurisdiction, namely, Lester L. Luntz of Hartford, Connecticut and John Furness of Liverpool, England.

(u) Further, defendant's counsel was delayed and hampered in his preparation for trial by refusal of the Judge of the Circuit Court of Platte County, Missouri, to require the State to timely produce said witnesses or, in the alternative, to permit defendant's counsel his expenses in procuring said depositions and other discovery of the aforementioned witnesses.

(v) That the State's failure to advise defendant's counsel that one of the aforementioned witnesses, namely, Lester L. Luntz, of Hartford, Connecticut was present in the State of Missouri in the month of February, 1978, at a convention of the American Academy of Forensic Science, unduly prejudiced and hampered the defendant in his preparation for trial. That said failure placed a great financial burden on the defendant's family by requiring defendant's counsel to timely seek discovery of the witness, Lester L. Luntz, in Hartford, Connecticut.

(w) Defendant was unduly prejudiced and hampered in his preparation for trial by the failure of the prosecutor to timely deliver to defendant's counsel the final reports of Dr. Furness of Liverpool, England, said reports having been available as of March 20, 1978. A portion of Dr. Furness' report was furnished to defendant on or about April 25, 1978 but the important portion, a three album set of photographs, were withheld from defendant until May 9, 1978. This greatly hampered and prejudiced the defendant's witness, Edwin E. Andrews, D.M.D., M. Ed. in his preparation for trial.

(x) That the defendant's counsel was unduly hampered and prejudiced in his preparation for trial by the refusal of the prosecuting attorney, Warren G. Plumb, to

allow defendant access to the permissible portions of his file on three separate occasions and his delinquent delivery to defendant's counsel of the death certificate of Julie Wittmeyer and a statement of the results of the investigation of R. P. Dempsay, Missouri State Highway Patrol Department, carried out on October 6, 1977.

(y) That defendant's counsel was unduly hampered and prejudiced in his preparation for trial by the refusal of the State to provide defendant's counsel with laboratory results of various and numerous articles found at the crime scene and taken from the body of Julie Wittmeyer in the following particulars, but not limited thereto, to-wit:

(1) Dirt samples taken from underneath the body of Julie Wittmeyer at the alleged scene of the crime.

(2) Contents of two plastic bags containing a leafy green vegetation found at the scene of the alleged abduction of Julie Wittmeyer.

(3) Laboratory results of the green synthetic substance found under the fingernails of the victim, Julie Wittmeyer.

(4) Laboratory results of all articles taken from the Sager family and the Sager automobile and the results of any tests made upon said articles.

(z) That defendant was unduly prejudiced and hampered in his preparation for trial by the failure of the prosecuting attorney to advise defendant's counsel, in writing, as to whether or not any of the fingerprints obtained during the investigation were in any way connected with the defendant, Mark E. Sager. (Defendant's counsel was orally advised that no fingerprints that were obtained during the investigation matched those taken from defendant, Mark E. Sager).

(aa) That the Prosecuting Attorney and Sheriff of Platte County, Missouri, have unduly deprived the Sager family of the possession and use of a 1967 Ford Galaxie automobile taken from said family on October 1, 1977.

(3) Said Indictment fails to state a cause of action upon which guilt can be predicated and punishment assessed, in that it fails to apprise defendant of the acts or offense with which he is charged.

(4) That all of the aforementioned acts and/or omissions are in violation of and contrary to the Constitution of the State of Missouri, Article 1, Sections 10, 12, 14, 15, 16, 17, 18 (a), 19, 20 and 21.

(5) That all of the aforementioned acts and/or omissions are in violation of and contrary to Missouri Supreme Court Rule 25 et seq.

(6) That all of the aforementioned acts and/or omissions are in violation of and contrary to the Constitution of the United States of America, Amendments IV, V, VI, VIII and XIV.

(7) That all the acts and/or omissions were greatly prejudicial to the rights of the defendant.

(8) That the defendant realleges and reincorporates his Motions filed heretofore with reference to the following:

(a) Motion to Suppress Evidence

(b) Motion to Quash Indictment

(c) Motion to Quash Grand Jury

(d) Motion to Dismiss Entire Jury Panel and Quash Indictment

(e) Motion to exclude the evidence offered by the State with reference to the bite mark evidence as being unreliable and unbelievable.

(9) That the verdict of the jury is illegal and contrary to law in the following particulars, to-wit:

(a) That the State wholly failed to prove by credible evidence and beyond a reasonable doubt the corpus delicti of the crime of manslaughter in the following particulars, to-wit:

(1) That the State wholly failed to prove the cause of death of the victim, Julie Wittmeyer.

(2) That the State wholly failed to prove the criminal agency or connection of the defendant with the said manslaughter in the following particulars, to-wit:

(a) That the State has alleged that the death of the victim occurred between the hours of 3:30 P.M. and 5:00 P.M. on September 2, 1977, wherein the death certificate filed as the official record by the Coroner, Roland Gifee, indicates that the death of the victim occurred at approximately 7:00 P.M. on September 2, 1977.

(3) That the State has wholly failed to prove the venue of the crime as alleged in the Indictment.

(4) That the State has wholly failed to prove by credible evidence and beyond a reasonable doubt the commission of the crime of manslaughter by the defendant.

(10) The verdict of the jury is not supported by any substantial and credible evidence beyond a reasonable doubt and viewed most favorable to the State is contrary to any theory of guilt in the following particulars, to-wit:

(a) That the State admitted that the crime must have occurred between 3:15 P.M. and 4:30 P.M. on September 2, 1977; that the record is entirely void of any evidence which substantiates that the crime occurred at said time but to the contrary there was no blood found at the spot of the alleged abduction and there was no sign of struggle or blood found at the place where the body was found.

(b) That the panties obviously were not in the road on September 3, 1977 as shown by two defense witnesses but were found on the road on Sunday, September 4, 1977, and were, according to the testimony of four officers, lying in plain sight visible up to twenty-five feet away.

(c) That the only evidence even approximating the time of death was the testimony of Roland Giffee, Platte County Coroner. He testified that death occurred at 7:00 P.M., on September 2, 1977.

(d) That the evidence adduced by the State, by and through their alleged medical experts, was based upon the fact that the right nipple of Julie Wittmeyer was absolutely bitten off, wherein the evidence of the pathologist adduced by the State unequivocally indicated that said nipple was intact.

(e) That the evidence adduced by the State by the alleged medical experts was not based on any experimental bites to determine if there could be any discrepancies that would be evident.

(f) That both of the alleged medical experts stated that only one unexplainable discrepancy was needed to exclude a suspect and in no way did the State attempt to rebut the evidence produced by the defense that there

were in fact five major discrepancies in the bite mark found upon the body and Mark Sager's dentition.

(g) That the opinion of the alleged expert was based on photographs that were not substantially exact. - 1.1.

(h) That the State admitted there was no fingerprints of defendant found and the defendant proved through State witnesses that there was no physical evidence found to connect the defendant with this crime even though the body had to be transported at some time.

(i) That the defendant produced evidence undisputed by the State that a car similar in color to the defendant's car was near the Wittmeyer drive between 1:30 P.M. and 2:40 P.M. and without any question the defendant was at work at Riverside, Missouri at said time.

(j) Also, one witness produced by the State stated that she saw a car similar to the defendant's car at about 3:35 P.M. to 3:40 P.M. basing her estimate of time on the fact that the "Mickey Mouse" show was almost over wherein the State proved by a custodian of the Records of KBMA television station that the "Mickey Mouse" show began at 4:00 P.M. and ended at 4:28 P.M. on September 2, 1977 and the State admits in their opening statement, that the defendant, Mark Sager, was at his home at 4:30 P.M. said time being corroborated by the undisputed evidence of five witnesses.

11. That the defendant by his own testimony and the testimony of his alibi witnesses proved by clear convincing evidence that it was impossible for him to commit the crime as alleged in the Indictment and that the State wholly failed to discredit any element of the defendant's alibi.

12. The Court erred as a matter of law and to the prejudice of the defendant and abused its discretion by improperly questioning the jury panel on voir dire thus depriving the defendant of his right to fully examine said jury, such actions of the Court being an improper oral instruction and a comment upon the evidence.

13. The Court erred as a matter of law and to the prejudice of the defendant in overruling the defendant's request to strike the testimony of witness, Dr. Irl Gladfelter, for the reason that said witness was not properly qualified as an expert to testify as to such matters relating to the science of forensic odontology and more particularly as to bite mark comparisons and for the further reason that said science of forensic odontology, with reference to bite mark comparisons, has not reached the stage of scientific reliability and credibility; therefore, not the subject of expert testimony.

14. The Court erred as a matter of law and to the prejudice of the defendant in overruling the defendant's request to strike the testimony of witness, Dr. Lester L. Luntz, for the reason that said witness was not properly qualified as an expert to testify as to such matters relating to the science of forensic odontology and more particularly as to bite mark comparisons and for the further reason that said science of forensic odontology, with reference to bite mark comparisons, has not reached the stage of scientific reliability and credibility; therefore, not the subject of expert testimony.

15. The Court erred as a matter of law and to the prejudice of the defendant in overruling the defendant's request to strike the testimony of witness, Mr. John Furness, for the reason that said witness was not properly qualified as an expert to testify as to such matters relating to the science of forensic odontology and more particularly

as to bite mark comparisons and for the further reason that said science of forensic odontology, with reference to bite mark comparisons, has not reached the stage of scientific reliability and credibility; therefore, not the subject of expert testimony.

16. The Court erred as a matter of law and to the prejudice of the defendant in allowing the State to reopen their case and adduce testimony with reference to the *chain* of custody of certain photographs, negatives, etc., that were allegedly delivered to witness, Dr. Lester L. Luntz, and witness, Mr. John Furness.

17. The Court erred as a matter of law and to the prejudice of the defendant by giving Instruction No. 8 with reference to the crime of manslaughter in the following particulars, to-wit:

(a) That there was no evidence produced that would substantiate the giving of a manslaughter instruction.

(b) That the instruction as given did not specify the time of the alleged death of the victim, Julie Wittmeyer.

18. That the Court erred as a matter of law and to the prejudice of the defendant by giving Instruction No. 12 (3.20) alibi for the reason that said instruction does not inform the jury that the defendant was under no duty to prove his alibi beyond a reasonable doubt.

19. That the Court erred as a matter of law and to the prejudice of the defendant by refusing to give instructions offered by the defendant, Nos. A or B or C or D. Said instructions being a proper instruction as to the matters contained therein.

20. That the Court erred as a matter of law in giving a portion of CR-MAI Instruction No. 1.10 thus misleading the jury as to their duties with reference to bringing in a verdict.

21. That the Court erred as a matter of law in permitting the State to produce evidence to the jury referring to defendant's juvenile record.

22. That the Court erred as a matter of law and the prejudice of the defendant by not sustaining defendant's motion to acquit filed at the close of the State's evidence and refiled at the close of all the evidence and refiled after the jury verdict for the reason that there is no evidence to substantiate the verdict of manslaughter.

23. That the Court erred as a matter of law and the prejudice of the defendant by permitting Officer Clarence Luther and Patrolman Mills to testify as to conversations had with the defendant on October 1, 2 and 5, 1977, after having previously suppressed the use of said evidence in the State's case in chief. Said statements taken in violation of defendant's constitutional rights and the Miranda decision.

24. The Court erred as a matter of law and to the prejudice of the defendant in requiring counsel to work long hours, past six o'clock, that is until 9:40 P.M. on May 23, 1978 and until 9:45 P.M. on May 24, 1978, causing great fatigue to counsel to the extent that he was unable to properly carry on his duties as defense counsel thus denying the defendant his right to have effective counsel contrary to the Sixth Amendment of the Constitution of the United States.

WHEREFORE, for reasons set out above, defendant prays this Court for a judgment of acquittal notwithstanding the verdict and to discharge defendant or, in the alternative, to grant defendant a new trial in the above entitled cause.

[Signature Omitted]

No. 80-607

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MARK E. SAGER,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

OPINION BELOW

The opinion of the Missouri Court of Appeals, Western District, affirming the Petitioner's conviction for manslaughter is reported at *State* v. *Sager,* 600 S.W.2d 541 (Mo.App., W.D. 1980).

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(c), which provides that this Court may review the final judgment of the

highest court of a state by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the failure to suppress evidence of an oral statement given by the Petitioner on October 1, 1977 constituted a violation of the Petitioner's right against self-incrimination pursuant to *Miranda* v. *Arizona,* and whether the use by the State of oral statements obtained on October 2, 1977 and October 5, 1977 for purposes of cross-examination and rebuttal was a permissible means of attacking the credibility of the Petitioner where the statements had been earlier declared to be inadmissible in the State's case in chief.

2. Whether the Petitioner's conviction for manslaughter was a "compromise verdict" or was justified by the evidence at trial in this case.

3. Whether the Petitioner was "hampered in his preparations for his defense" by the acts of the prosecutor.

STATEMENT OF FACTS

The respondent adopts, as its Statement of Facts, the statement of the facts which appears in the opinion issued in this case by the Missouri Court of Appeals, Western District. See *State* v. *Sager,* 600 S.W.2d 591, 543-556 (Mo. App., W.D. 1980). The facts relevant to the issues advanced by the Petitioner are further outlined, in considerable detail and with transcript reference, under the section styled "Reasons for Denying the Writ", *infra.* No purpose would be served by duplicating that recitation of the facts in this section of the respondent's response.

ARGUMENT

I.

The trial court did not err (1) by overruling the Petitioner's motion to suppress evidence of an oral statement given on October 1, 1977, because the statement was obtained pursuant to the requirements of Miranda **v. Arizona, or (2) permitting the State to cross-examine the Petitioner about oral statements given on October 2, 1977, and October 5, 1977, and also permitting the use of those statements for rebuttal purposes because those statements were sufficiently trustworthy to be used for impeachment purposes to attack the credibility of the Petitioner's trial testimony.**

The Petitioner's argument on this issue challenges the use and admission of certain statements given by the appellant on three dates following his arrest, October 1, October 2 and October 5, 1977. The trial court ruled that the statement given on October 1st would be admissible in the State's case in chief (Tr. 187). The statement of October 5, 1977, was determined by the court to have been obtained contrary to the Petitioner's rights and would not be admissible as a part of the State's case in chief (Tr. 187). Later, the court ruled that the statement of October 2, would not be admissible as a part of the State's case in chief (Tr. 1019).

Each of these conclusions of the trial court was reviewed at length and approved by the Missouri Court of Appeals, Western District. *State* v. *Sager,* 600 S.W.2d 541, 553[1], 556-557[3][4][5][6] (Mo.App., W.D. 1980). The appellate court held, in summary, that the statement of October 1, 1977 was admissible in the State's case in chief due to the Petitioner's failure to demonstrate the involuntariness of the statement under *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The admis-

sion of the statements of October 2 and October 5, 1977 for purposes of cross-examination and rebuttal was held to be proper impeachment upon prior inconsistent statements as approved by this Court in *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). *State* v. *Sager, supra,* 600 S.W.2d at 560-561[7].

Upon this application for writ of certiorari, the Petitioner has presented no new argument or citation of authority. Nor has he indicated what were the errors committed by the Missouri Court of Appeals in affirming his conviction. The sole reference to that opinion in the Petition of Certiorari does not advance the Petitioner's argument, since it is completely false. It is alleged that, "The Missouri Court of Appeals totally ignored the holdings of the above-quoted [*Miranda* v. *Arizona; Harris* v. *New York*] U.S. Supreme Court cases." (Petition for Cert., p. 11). As noted above, it is precisely these two cases, *Miranda* and *Harris,* upon which principal reliance is placed by the Missouri Court of Appeals in support of its ruling. Far from 'totally ignoring' these controlling authorities, the opinion of the Missouri Court of Appeals cited *Miranda* sixteen times and *Harris* six times.

It is the Petitioner, not the Court of Appeals, who has ignored the *holding* of the *Harris* case. On page 10 of the Petition, a lengthy quotation from the *Harris* case is offered as the opinion of "the Court". (Petition for Writ of Cert., p. 9). However, the excerpted passage is not to be found in the opinion of this Court entered in that case, 401 U.S. 222-226. It is, in fact, an excerpt from the dissenting opinion of Justice Brennan, 401 U.S. at 228, 91 S.Ct. at 647.

The Petitioner first argues that the statement of October 1st was obtained in violation of the Petitioner's rights under *Miranda* v. *Arizona,* 386 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Petitioner further argues that the

two statements of October 2nd and 5th were correctly excluded by the court from the State's case in chief, but that the court erred by permitting the use of those statements by the State to impeach the Petitioner's testimony. He further claims that the use of these statements by rebuttal witnesses, attempting to discredit the truthworthiness of the Petitioner's testimony, was improperly permitted by the trial court. The first issue, therefore, concerns the propriety of the October 1st statement as evidence in the State's case in chief. The second issue involves the use of statements excluded from the State's case in chief but admitted for impeachment purposes.

It is beyond dispute that "the prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda* v. *Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). After the proper warnings have been given, if the interrogation continues without the presence of an attorney and a statement is taken, "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda* v. *Arizona, supra,* 86 S.Ct. at 1628.

Recently, in *North Carolina* v. *Butler,* ____ U.S. ____, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979), this Court explained its holding in *Miranda* v. *Arizona. Butler* involved a defendant who was arrested in New York on the basis of a North Carolina fugitive warrant. Following his arrest by the F.B.I., the defendant was fully advised of the rights delineated in the *Miranda* case. The defendant was taken to a nearby F.B.I. office where the agents determined that he had an 11th-grade education and was literate. He verbally stated that he understood his rights but he refused

to sign a written waiver. He replied, "I will talk to you but I am not signing any form." Following this, the defendant made inculpatory statements. At no time did the defendant request counsel or attempt to terminate the agents' questioning. *North Carolina* v. *Butler, id.*, 99 S.Ct. at 1756. The defendant, then, expressly waived his right to silence but did not expressly waive his right to counsel. In holding that an expressed waiver was not necessary, this Court stated that "[t]he question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case." *North Carolina* v. *Butler, id.*, 99 S.Ct. at 1757. This Court went on to hold that, "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *North Carolina* v. *Butler, id.*, 99 S.Ct. at 1757. This Court adopted the view which previously 10 of the 11 United States Courts of Appeal and the courts of at least 17 states had adopted, namely, that an explicit statement of waiver is not invariably necessary to support a finding that the defendant waived the right to remain silent or the right to counsel guaranteed by the *Miranda* case. *North Carolina* v. *Butler, id.*, 99 S.Ct. at 1759.

In the instant case, Clarence Luther, one of the arresting officers, testified that he arrested the Petitioner at his residence on October 1, 1977 (Tr. 981). Luther advised the Petitioner of his rights under the *Miranda* decision (Tr. 983). The Petitioner verbally stated that he understood his rights but that he refused to sign a waiver, since his mother had instructed him not to sign anything (Tr. 983). In order to positively ascertain that the Petitioner understood his rights, Luther asked him if he would be willing to talk to the police without an attorney present (Tr. 983). The Petitioner indicated that he would be willing to talk but that he would not admit to anything (Tr. 983). Luther reminded the Petitioner of the seriousness of the crime

and of the fact that he was a suspect (Tr. 984). Luther learned from the Petitioner that the Petitioner was a senior in high school and again reminded the Petitioner that he was a prime suspect in the murder investigation (Tr. 984). Luther indicated that the Petitioner was very concerned about learning what physical evidence the police had against him (Tr. 984). Luther and the Petitioner discussed the physical evidence, particularly the bite mark on the victim's body, for some time (Tr. 985). After this discussion, Luther stated that the Petitioner made the statement, "so you can prove that I bit her on the breast, but what does that prove?" (Tr. 985). After Luther indicated that he had never told the Petitioner the location of the bite mark and that such a statement indicated that he was present at the murder scene (Tr. 986), the Petitioner began to relate his activities on the day of the murder, September 2, 1977 (Tr. 986).

The Petitioner gave a lengthy statement to the police (Tr. 986-989), after which Luther asked him, "Mark, what's keeping you from going on and telling us all about how you killed Julie Wittmeyer and how she was killed?" (Tr. 989). Luther testified that, after a long pause, the Petitioner held his head down and then stated, "If my daddy will let me tell you, I will tell you everything how she was killed and everything" (Tr. 989-990). Luther testified that the interview terminated at that point (Tr. 990). Although the Petitioner's statement to Officer Luther was quite extensive, the Petitioner, in his brief, objected only to one portion of that statement:

> "Q. Mark was asked what it would take to get him to tell us how his teeth impressions got on Julie's breast and how Julie was killed. Is that correct?
>
> A. That's correct.
>
> Q. And Mark replied: 'If my dad tells me to

tell you I will tell you everything and how Julie was killed.'

A. That's what he stated." (Tr. 1009).

The record indicates that Officer Luther went to great lengths to inform the Petitioner of his rights and to determine absolutely that the Petitioner had voluntarily and knowingly waived those rights (Tr. 983-984). The Petitioner stated that he understood his rights and that he would be willing to talk to Officer Luther (Tr. 983). The Petitioner admitted that he never asked for an attorney during this time (Tr. 1837).

Although the law does not require the police to obtain an express waiver of rights from the Petitioner, *North Carolina* v. *Butler, supra,* 99 S.Ct. 1757, the police did obtain an express waiver from the Petitioner in this case. Clearly, the circumstances surrounding the interrogation of the Petitioner on October 1, 1977, revealed that the Petitioner understood and knew what rights were his under the law and that he knowingly and voluntarily waived the rights delineated in the *Miranda* case. *North Carolina* v. *Butler,* id., 99 S.Ct. at 1757. No allegation is made that the Petitioner had retained counsel at this time nor does the record contain even the slightest hint that the Petitioner's rights were violated in any way whatsoever. As a result, the trial court was correct in permitting the statement given by the Petitioner to the police on October 1, 1977, to be used in the State's case in chief. The Missouri Court of Appeals correctly ruled that the requirements of the *Miranda* case with regard to this evidence were completely satisfied. *State* v. *Sager, supra,* 600 S.W.2d at 556.

The Petitioner also argues that the oral statements made by him to the police on October 2nd and October 5th of 1977 could not be properly used even for impeach-

ment purposes. As earlier noted, the trial court ruled that the statements received on October 2nd and October 5th were not admissible as a part of the State's case in chief (Tr. 187, 1020). Although the reason for the trial court's exclusion of those statements is not clearly stated in the record, the appellate court has concluded that these statements were properly excluded as evidence in the State's case in chief, because the State "had failed to carry its burden showing the state was not aware of the entry of defense counsel at the hearing upon the motion to suppress." *State* v. *Sager, supra,* 600 S.W.2d at 561. Although the State disputed the propriety of this ruling of the trial court, and still contends that the principles of the *Miranda* case would not have been contravened by the admission of this evidence as a part of the State's case in chief, the following discussion will assume, for purposes of argument, that the trial and appellate courts were correct in their conclusion that this evidence was properly excluded.

The rule is clear that a statement which is inadmissible against a defendant in the prosecution's case in chief because of a lack of the procedural safeguards required by *Miranda* v. *Arizona, supra,* 86 S.Ct. at 1602, may, if it is sufficiently trustworthy, be used for impeachment purposes to attack the credibility of a defendant's trial testimony. *Harris* v. *New York,* 401 U.S. 222, 91 S.Ct. 643, 644, 28 L.Ed.2d 1 (1971). The exclusionary rule is applied only to the case in chief of the prosecution and not as it regards any use for impeachment purposes. The reasons for this rule were announced in *Harris*:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this process should not be lost, in our view, because of a speculative possibility

that impermissible police conduct will be encouraged thereby." *Harris* v. *New York, id.,* 91 S.Ct. at 645.

Statements obtained in violation of *Miranda* may be utilized nevertheless to test the truthfulness of a defendant's testimony. "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris* v. *New York, id.,* 91 S.Ct. at 646. Statements obtained from a defendant in violation of his *Miranda* rights may be offered for impeachment purposes if those statements were given voluntarily. *United States* v. *McIntyre,* 467 F.2d 274, 277 (8th Cir. 1972), *cert. den.,* 410 U.S. 911, 93 S.Ct. 972, 35 L.Ed.2d 274 (1973). On the other hand, however, any use of a defendant's involuntary statement at a criminal trial is a denial of due process of law. *Mincey* v. *Arizona,* 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290 (1978). In *Harris* v. *New York, supra,* 91 S.Ct. at 645, the court noted that the statements made to the police by the defendant were not coerced but were voluntarily made. Where the defendant takes the stand and denies his guilt, the state is entitled to question him about his prior statements for the purpose of impeaching his credibility as a witness. *United States* v. *Rooks,* 577 F.2d 33, 37-38 (8th Cir. 1978). The correctness and applicability of the above-stated principles of federal constitutional law were recognized by the Missouri Court of Appeals in its opinion in this case. *State* v. *Sager, supra,* 600 S.W.2d at 560-561.

Assuming, *arguendo,* that the statements obtained from the Petitioner were received contrary to his rights under *Miranda,* clearly, they could be offered for purposes of impeachment. Terry Deister testified that on October 2, 1977, he contacted Mark Sager for the purpose of transporting him to the jail at Lexington, Missouri (Tr. 92).

Officer Deister rode in the back seat of the car while Corporal Dayringer drove the automobile (Tr. 93). Prior to entering the vehicle, Officer Deister informed the Petitioner of his constitutional rights by reading "the standard Miranda Warning Card" (Tr. 93). The Petitioner indicated that he understood his constitutional rights (Tr. 94). The Petitioner indicated a desire to talk about his case, and Officer Deister explained that he was taking the Petitioner to Lexington for security purposes (Tr. 94). The Petitioner began to ask Deister questions about his case (Tr. 105-106). Additionally, the Petitioner indicated a desire to finish the statement that he had started the previous day (Tr. 106). The Petitioner's statement was recounted by Deister when he was called as a rebuttal witness by the State (Tr. 1926-1930).

The record discloses that, without a doubt, the Petitioner made his statement to Officer Deister on October 2, 1977, voluntarily. He had been informed of his rights, had expressly acknowledged that he understood his rights, and subsequently began to interrogate Officer Deister concerning his case.

Even if this statement was inadmissible as a part of the State's case in chief, which is disputable, certainly its use for impeachment purposes was proper. A defendant is privileged to testify in his own defense, but that privilege is not construed by this Court to include the right to commit perjury. *Harris* v. *New York, supra,* 91 S.Ct. at 645. In this case, the prosecution did no more than utilize the traditional truth-testing devices of the adversary process. *Harris* v. *New York, supra,* 91 S.Ct. at 645-646. The trial court properly realized that the shield provided by *Miranda* should not be perverted into a license to use perjury by way of a defense, freeing the Petitioner from the risk of confrontation with prior inconsistent statements. *Harris* v. *New York, id.,* 91 S.Ct. at 646. As a result, no

error was committed in r ard to the statement of October 2, 1977.

On October 5, 1977, Clarence Luther and Fred Mills, of the Kansas City, Missouri Police Department and of the Missouri Highway Patrol, respectively, interviewed the Petitioner in the Lexington, Missouri Jail (Tr. 122). The officers advised the Petitioner of his constitutional rights and presented him with a written waiver which he read and signed (Tr. 122). The Petitioner stated that he would talk to the officers concerning the homicide but that he would not admit anything (Tr. 122). Luther asked the appellant if his parents had retained an attorney for him and the Petitioner replied that they had retained an attorney named Brown, but that he was unsure whether or not his parents would keep this attorney (Tr. 122). Officer Luther then asked the Petitioner if he would be willing to discuss his case with them without the presence of an attorney (Tr. 123). The Petitioner agreed and subsequently discussed his case with them for approximately one and one-half hours (Tr. 123). Officer Luther was called as a rebuttal witness by the State and recounted the statement made by the Petitioner on October 5, 1977 (Tr. 1893). Luther and the Petitioner had discussed the bite mark on the victim and then had discussed the knife which was used to murder her (Tr. 1893). Luther explained to the Petitioner that the police had searched his house looking for the knife (Tr. 1894). At that point, Luther testified, the Petitioner's whole personality changed and he started laughing, he hit his hand on the desk, slapped his legs and said, "You didn't find it, did you?" (Tr. 1894). Luther responded, " 'Mark, how can you be so sure we didn't find the knife?' He says, 'I know because if you tell me you found the knife used to kill her that you're lying to me because I know you didn't find the knife.' " (Tr. 1895). Luther testified that the Petitioner persisted

in telling him that he was wasting his time searching for the knife because he would not find it (Tr. 1895).

During the interview, Luther discussed with the Petitioner the Petitioner's relationship with his mother (Tr. 1896). Luther testified that the Petitioner had admitted that on one occasion he had choked his mother (Tr. 1896). The Petitioner stated that he knew choking his mother was wrong but that he was capable of putting that incident out of his mind as if it had never occurred (Tr. 1896).

The Petitioner took the stand and testified concerning his activities on the day of the murder, September 2, 1977 (Tr. 1828-1835). He indicated that his mother had driven him from school to the Riverside Drive-In, where he was employed (Tr. 1829). Further, the Petitioner denied telling the police on October 1, 1977 that he would tell them how Julie Wittmeyer was killed if his father would permit him (Tr. 1837). The Petitioner stated that he did not ask for an attorney because he "had not done anything" (Tr. 1837). The Petitioner was questioned at length concerning his knowledge of the location of the bite mark and of his consent to the taking of his teeth impressions (Tr. 1837-1838). Finally, the Petitioner unequivocally denied committing the murder (Tr. 1838).

The use by the State, during cross-examination and rebuttal, of certain inconsistent statements made by the Petitioner on October 2nd, and October 5th, 1977, was to attack the credibility of the Petitioner. The statement given by the Petitioner on October 5th was quite extensive but was introduced, in response to issues raised by the Petitioner during his direct examination. The Petitioner discussed the issue of the location of the bite mark on the victim (Tr. 1837), as well as the statement that he would relate to the police the circumstances of the murder (Tr. 1837). Moreover, the Petitioner emphatically denied that he had committed the murder (Tr. 1838).

Because the Petitioner took the stand and denied his guilt and because he raised the issues which the State sought to refute, his prior statements, even if not admissible as a part of the State's case in chief, were admissible for the purpose of impeaching his credibility as a witness. *United States* v. *Rooks, supra,* 577 F.2d at 37-38. The State was merely impeaching the credibility of the witness as it would be entitled to attack the credibility of any witness. *State* v. *Moore,* 546 S.W.2d 10, 13 (Mo.Ct.App. at St.L. 1977).

The Petitioner has apparently abandoned his earlier reliance on *State* v. *Johnson,* 524 S.W.2d 97 (Mo. banc 1975), which involved a discovery problem rather than a constitutional issue. Instead, sole reliance is placed upon *Miranda* v. *Arizona, supra,* the dissenting opinion of Justice Brennan in *Harris* v. *New York, supra,* and the opinion of the United States Court of Appeals for the Fifth Circuit in the case of *United States* v. *Havens,* 592 F.2d 848 (5th Cir. 1979). Of these, only the *Miranda* opinion is controlling on this Court, and, as demonstrated in the opinion of the Missouri Court of Appeals, the requirements of *Miranda* were complied with fully. *State* v. *Sager, supra,* 600 S.W.2d at 560-561[7].

The Petitioner's reliance upon the Fifth Circuit's opinion in *United States* v. *Havens, supra,* 592 F.2d 848, is completely misplaced, since the judgment of the Fifth Circuit in that case was specifically reversed by opinion of this Court filed in *United States* v. *Havens,* ____ U.S. ____, 100 S.Ct. 1912, 64 L.Ed.2d 559 (1980). The reasons which led this Court to reverse in *Havens* dictate that the arguments of the Petitioner on this Petition be rejected.

The appellant's argument regarding the alleged error in admitting for purposes of cross-examination and rebuttal his statements of October 2, 1977 and October 5,

1977 depends completely on his claim that, "at no time during direct examination did the Petitioner refer to or deny any of the statements made on October 2, 1977 and October 5, 1977" (Pet. for cert., p. 10). The Petitioner contends that this fact, pursuant to the rationale announced in Justice Brennan's dissent in *Harris* and followed in the since-reversed opinion of the Fifth Circuit in *Havens,* operated to prohibit the introduction of the challenged inculpatory evidence on cross-examination or rebuttal.

This Court specifically addressed the question of whether or not impeachment evidence must be related to statements referred to on direct examination of the defendant in the *Havens* case:

> "[A] defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." *United States* v. *Havens, supra,* 100 S.Ct. at 1917[3].

In *Havens,* as in the present case, previously inadmissible evidence was brought in both for purposes of cross-examination and for rebuttal. See also *United States* v. *Rada-Solano,* 625 F.2d 577, 579[1] (5th Cir. 1980).

The only true issue with respect to the use of the challenged evidence by the State is the question of whether the cross-examination attempted was "reasonably suggested by the defendant's direct examination", *United States* v. *Havens, supra,* 100 S.Ct. at 1917. The State of Missouri submits that those excerpts from the Petitioner's direct testimony which are reproduced in the opinion of the Court of Appeals (*State* v. *Sager, supra,* 600 S.W.2d at 558; Pet. for Cert., p. A-37) do in fact suggest, both

generally and specifically, that the Petitioner was testifying in a manner contrary to the evidence later presented by the police officers. As this Court has noted, it is essential to the proper functioning of our adversary legal system that when a defendant takes the stand on his own behalf, the government must be permitted to engage in "proper and effective cross-examination in an attempt to elicit the truth." *United States* v. *Havens, supra,* 100 S.Ct. at 1916[1,2]. The privilege against self-incrimination, protected by the Fifth Amendment and discussed in *Miranda, supra,* demands no more than this. *Brown* v. *United States,* 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958); *United States* v. *Havens, supra,* 100 S.Ct. at 1916.

As the repeated references to the opinion of this Court in *United States* v. *Havens, supra,* would indicate, there is no question raised by this Petitioner's Petition for Writ of Certiorari on the *Miranda* issue which is not fully answered by the opinion of this Court in *Havens.* The question of law having been fully considered and properly ruled by the Missouri Court of Appeals, no purpose would be served by a further review of this matter before the Supreme Court of the United States.

Under the circumstances of this case, the trial court did not commit error when it permitted the statement of October 1, 1977, to be admitted as a part of the State's case in chief. Nor did the Court err when it allowed the State to use the Petitioner's statements of October 2nd and October 5th, 1977, for impeachment purposes, because the statements were voluntarily given and because the State used the statements for rebuttal purposes only. This Court, therefore, should not afford the Petitioner relief on this point. The opinion of the Western District of the Missouri Court of Appeals affirming this conviction, *State* v. *Sager, supra,* was not erroneous for any reason.

II.

The jury verdict of guilty of manslaughter does not reflect any impermissible compromise but is fully supported by the evidence at trial sufficient to support a finding beyond a reasonable doubt that the appellant "caused the death of Julie Wittmeyer by stabbing and cutting her".

No citation of authority or invocation of constitutional principle attends the Petitioner's brief argument alleging that "the jury was misled and compromised their verdict (Pet. for Cert., p. 8). This issue was fully addressed by the opinion of the Missouri Court of Appeals, Western District, and the appellant has presented no argument demonstrating wherein that Court may have erred in its disposition of this issue. *State* v. *Sager, supra,* 600 S.W.2d at 575-576. As that Court noted, the Petitioner argues that the evidence "was so abundant that the jury could have found appellant guilty of capital murder", and it was thus a necessary conclusion from this premise that the lesser included offense, under the Missouri Statutory scheme, of manslaughter was also proved by said evidence. *State* v. *Sager,* 600 S.W.2d at 576[15]. As Instruction No. 8, the manslaughter instruction, submitted, there was sufficient evidence of record to warrant the finding that the Petitioner had caused the death of the victim by stabbing and cutting her. There is no element of manslaughter in Missouri which is not included within the greater offenses of homicide, evidence in support of which the Petitioner has admitted may be found of record. It is obvious that the jury may determine, and in this case has determined, that the elements of premeditation or intent which distinguish the higher degrees of homicide were not proved beyond a reasonable doubt. It is not inconsistent with this determination for the jury to conclude further that the question of whether the Petitioner had "caused the death of Julie Wittmeyer by stabbing and cutting her" was in fact proved

beyond a reasonable doubt (Instruction No. 8). The verdict actually returned by the jury in this case evidences their conclusion that these elements, which constitute manslaughter in Missouri, were proved by the State beyond a reasonable doubt.

III.

There is no evidence or argument presented to demonstrate that the Petitioner was "greatly hampered in his preparations" of the defense in this case by any act of the prosecutor.

As with the Petitioner's argument regarding the jury's verdict, there is no citation of authority or invocation of constitutional principle attached to the Petitioner's passing reference to his alleged difficulties in preparing a defense. Although no factual assertions are advanced, the petitioner has cited his Motion for Judgment of Acquittal and in the Alternative to Grant a New Trial as establishing his right to relief on this ground (Pet. for Cert., p. 11). However, that Motion filed at trial relates dozens of factual claims taking up fourteen pages of the Petitioner's brief before this Court (Pet. for Cert., A94-A107). This 'shotgun' approach to the presentation of claims for relief on appeal cannot possibly avail the Petitioner. His conviction was fully and carefully considered by the Missouri Court of Appeals, and the reasons for that Court's affirmance of conviction were fully and carefully recorded in an extraordinarily lengthy opinion. In light of the attention which has already been given the Petitioner's claims of error actually argued, there can be no question but that these unspecified general allegations of error are in fact insubstantial and need not be rebutted.

CONCLUSION

For the reasons outlined in the previous section of this response, the respondent respectfully urges this Court to deny the Petitioner's request for a Petition for Writ of Certiorari to the Missouri Court of Appeals, Western District.

Respectfully submitted,

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No. 80-607

In the Supreme Court of the United States

October Term, 1980

STATE OF MISSOURI,
Respondent,

vs.

MARK E. SAGER,
Petitioner.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

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REPLY TO RESPONDENT'S ARGUMENT
POINT ONE

Petitioner restates his position that the trial court erred to the prejudice of the Petitioner and the Missouri Court of Appeals, Western District of Missouri, compounded the error, to the prejudice of the Petitioner in overruling the Petitioner's motion to suppress evidence of an oral statement given on October 1, 1977, because the statement was not obtained pursuant to the requirements of *Miranda v. Arizona;* by permitting the State to cross-examine the Petitioner about oral statements given on October 2, 1977 and October 5, 1977 and also permitting the use of those statements for rebuttal purposes because those statements were

not sufficiently truthworthy to be used for impeachment purposes to attack the credibility of Petitioner's trial testimony.

The trial of *State of Missouri v. Sager*, 600 S.W. 2d 541 (Mo. App. W.D. 1980) was commenced on May 23, 1978 and ended June 1, 1978. The jury found the Petitioner guilty of manslaughter and his sentence was later assessed by the Court at ten (10) years in the Department of Corrections of the State of Missouri.

At the time of trial counsel for Petitioner Sager attempted to present his defense within the framework of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971) and *Walder v. U.S.*, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). Counsel for Petitioner Sager was under the impression that these cases held that unless defendant in his direct examination referred to any of the matters contained in the summaries of the oral statements given on October 2, 1977 and October 5, 1977 same would be inadmissible on cross-examination by the State and also inadmissible on rebuttal. Counsel strenuously objected to the State's going into any matters on cross-examination that would bring out the contents of the statements made on October 2, 1977 and October 5, 1977 which heretofore had been suppressed by the trial court by the use of the State's case in chief. The trial court noted defendant's objection and overruled same. (Tr. 1845)

It would appear from the majority opinion in the *Harris* case, supra, that limited cross-examination by the State of matters referred to in direct examination would be permitted but nowhere in the majority opinion of the *Harris* case, supra, does it indicate that the State could fully cross-examine defendant on all matters contained in summaries of oral statements allegedly made by defendant

which had previously been suppressed for use by the State in its case in chief.

The majority opinion in the *Harris* case, supra, certainly does not indicate that said statements could be used by the State as rebuttal.

The *Harris* case, supra, was a split decision and the Petitioner believes that the dissenting opinion in the *Harris* case more correctly stated the Court's position as to the use of the alleged statements as *rebuttal evidence.* (Emphasis ours)

Counsel for Petitioner Sager filed his last Brief in the Missouri Court of Appeals, Western District, on November 19, 1979 and cited as one of his principal authorities, to sustain his position with reference to cross-examination of Petitioner and use of oral statements in rebuttal, the case of *U.S. v. Havens,* 592 F. 2d 848 (5th Cir. 1979). Counsel for Petitioner Sager is embarrassed by his failure to note that a Writ of Certiorari in the *Havens* case was granted to the Supreme Court and certain portions of *Harris,* supra, and *Havens,* supra (5th Circuit), were further enlarged and reversed by this Court by Opinion handed down May 27, 1980, *U.S. v. Havens,* 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980).

It would appear that again this Court has rendered a split decision with reference to this very important point. After carefully studying *U.S. v. Havens,* 100 S. Ct. 1912, counsel for Petitioner Sager believes and agrees with the majority of this Court when it said:

> "It is essential, therefore, to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted *proper* and effective cross-examination in an attempt to elicit the truth." (Emphasis ours)

Certainly no law abiding citizen, especially a lawyer, would want otherwise. At the same time the privileges granted to persons accused of crimes by the Constitution of the United States should not be weakened to a point of extinction!

In the Sager Opinion, the Missouri Court of Appeals, Western District, noted that the State had failed to carry its burden showing the State was not aware of the entry of defense counsel at the hearing upon the motion to suppress, *State v. Sager,* 600 S.W. 2d at 561.

Transcript of the Motion to Suppress Evidence and depositions of Officer Luther, Officer Mills, Officer Diester, Officer Bell and Officer Beeler clearly show that Officer Diester and Officer Luther and Officer Mills flagrantly violated defense counsel's demand that his client NOT be interrogated without his presence.

Counsel for Petitioner Sager restates his position that such a flagrant violation of Petitioner's rights can only be properly prevented by totally excluding the use of said statement entirely. However, counsel has no case directly on that point and at this time requests that this Court examine the Sager case within the framework of *U.S. v. Havens,* 100 S. Ct. 1912, supra, wherein the case said:

> "We reaffirm this statement of the competing interests, and hold that a defendant's *statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination* are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt." (Emphasis ours)

The Petitioner is attaching as an Appendix the complete trial testimony of Petitioner Sager and humbly sug-

gests to the Court that the cross-examination by the State, over the objection of Defendant, and the later use of said oral statements on rebuttal, over the objection of defendant, was not reasonably "SUGGESTED" by defendant's direct examination and therefore prejudicially inadmissible.

CONCLUSION

Petitioner Sager, for reasons outlined in previous sections of Reply to Respondent's Brief in Opposition to Petition, respectfully urges this Court to grant Petitioner's Petition for a Writ of Certiorari to the Missouri Court of Appeals, Western District.

Respectfully submitted,

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APPENDIX

[1828] MARK EDWARD SAGER,

called as a witness in his own behalf, having been first duly sworn, under oath testified as follows:

Direct Examination

By Mr. Brown:

Q. Would you state your full name, please? A. Mark Edward Sager.

Q. What is your age, Mark? A. Seventeen.

Q. You're the defendant in this case, are you not? A. Yes, I am.

Q. Calling your attention to the events of September 2nd, 1977, do you recall what you did that day? A. Yes, I do.

Q. Starting with about 12:15 or twelve o'clock on September 2nd, 1977, where were you? A. At what time?

[1829] Q. About twelve o'clock, around noon. A. I was at school.

Q. What did you do? A. At 11:55 I signed out at the office.

Q. Speak up. A. Went to the pay phone and called my mother.

Q. Did she come then to Platte City to get you? A. Yes, she did.

Q. What did you do next? A. We went out in the parking lot and she picked me up and I asked her if she could—[interrupted]

Q. Don't say what you asked. Where did your mother take you if anyplace? A. She took me to home.

Q. What did you do at home? A. She jump-started my car at that time.

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Q. Then where did you go? A. I went straight to work.

Q. Where did you work? A. At Riverside Drive-In in Riverside, Missouri.

Q. Do you remember the telephone number of where you worked there? A. Yes. 741-0811.

Q. What time did you get to work? A. Around about 1:15, 1:30.

[1830] Q. What were you doing at work that day? A. Mowing the grass.

Q. How were you dressed? A. I had a pair of blue jeans and T-shirt and pair of boots.

Q. Did you have those boots that we have marked that you have seen this pair around the courtroom? A. Yes, I did.

Q. Exhibit 12. Were you wearing those boots? A. Yes, those boots.

Q. Did you wear your shirt all afternoon or did you take it off while you were working? A. I took it off while I was working.

Q. While you were there that afternoon, did anyone give you a message about three o'clock or so? A. Yes.

Q. What type of message was it? A. That I was supposed to call someone at work.

Q. Did they give you the name of the party you were supposed to call? A. No, they didn't.

Q. Think a minute, give us the best recollection you can of the time that someone told you that you had to make a phone call or you had a phone call. A. I would have to say it was about ten-, fifteen-after-three.

Q. Did you recall that call immediately? [1831] A. No, I did not.

Q. Did you attempt to call someone then from down at the Riverside? A. Yes, I did.

Q. Where did you make the call from the building? A. I made it from the box office right there.

Q. Who did you call? A. I called Paula Fee.

Q. Is that the young lady that testified the other day? A. Yes, it is.

Q. Where did you call her? I mean, where was she? A. She was at work.

Q. Where did she work? A. She worked at Holiday Inn at KCI.

Q. Did you talk to her there? A. Yes, I did.

Q. Did she give you a message? A. Yeah.

Q. As best again that you recall, what time do you think you made that telephone call? A. Around about twenty-after, fifteen, around there.

Q. What did you do after that? A. Went and asked Dennis if I could get off work early because I had to go in the hospital.

Q. Did he have you do anything else after that? [1832] A. Yes, he did.

Q. What did you have to do? A. I had to finish mowing the bank next to the road, the grass up there.

Q. How long did it take you to do that? A. About five, ten minutes, fifteen at the most.

Q. Then what did you do next with reference to leaving? A. I went and asked Dennis if he could jump-start my car.

Q. Did he help you jump-start your car? A. Yes, he did.

Q. Then what did you do? A. I went straight home.

Q. Tell us the route you took to go home? A. Well, I came out of the Riverside Drive-In and I went to I-29 and proceeded north on I-29 to 112th Street, and went about maybe a thousand yards, and then turned on Am-

bassador Drive and I went to the Holiday Inn and drove around the parking lot.

Q. What was the purpose of going into the Holiday Inn? A. To see if Paula was still at work.

Q. Did you expect to see her car there in the lot or something? A. Yeah.

Q. Was it there? A. No, it was not.

Q. Where did you go from there? [1833] A. I went on the access road of O Highway to O Highway; from O I went to 92 Highway over to B Highway to home.

Q. Is that a normal way for you to go home? A. Mostly normal.

Q. When you got home, who was there, if anybody? A. My brother was home.

Q. Tell us in your best judgment what time did you get home? A. I got home around about ten-after-four.

Q. What did you do? A. I asked my brother— [interrupted]

Q. No, no. Mark, you can't talk about things you talked about. What did you do after you got home? A. I made phone calls.

Q. Who'd you call? Who'd you talk to? A. I talked to Paula.

Q. Paula Fee; same girl? A. Yes.

Q. Where did you call her this time? A. She was at home.

Q. Did she again give you a message? A. Yes, she did.

Q. After that, did you attempt any more telephone calls? A. Yes, I did.

Q. Tell us what calls you tried to make. [1834] A. I tried to call back down to Riverside Drive-In.

Q. At first, did you receive busy signals or something? A. Yes, I did.

Q. Did you finally make connection at the Riverside Drive-In? A. Yes, I did make a connection.

Q. Did you talk to anyone? A. No, I did not.

Q. Tell us about that connection. A. I had received a busy signal two or three times, and then at the last attempt to call down, I then received the ringing sound and as about the second ring someone picked the phone up and then put the phone back down.

Q. Did that cause you to be angry? A. Yes, it did.

Q. What did you do then? A. I put the phone down hard.

Q. Did it break it? A. Yes.

Q. Then right after that what were you doing then at home? A. I tried to fix the phone.

Q. Did anyone help you? A. Yes, my brother did.

Q. Your little sister wasn't home when you got there; right? A. No, she was not.

Q. Did she come in after a bit? [1835] A. Yes, she did.

Q. What time does she usually get home on the bus; do you know? A. Around about 4:30.

Q. Did she come in about her usual time? A. Yes.

Q. Did you see anyone else at your home about that time? A. Danny Wheeldon and Greg Baggett arrived then.

Q. Do you know, just your best judgment, what time they got there? A. Around 4:30 to twenty-five-to-five.

Q. What did you do? A. We tried to install an AM radio.

Q. What happened next? A. My mother and father came and told me I was going to have to go to the hospital.

Q. Then what happened? A. I got in the car and drove to the hospital.

Q. Do you know what time you got to the hospital? A. Around about five, ten-till-six.

Q. Were you finally then admitted to the hospital? A. Yes, I was.

Q. Did you stay there? A. Yes.

Q. Your mother and father left? A. Yes.

[1836] Q. Mark, there was a young lady on the stand the other day that said you had some mats in the front of your automobile. Describe to the jury the floor matting material, what-have-you, that's in the front of your automobile. A. Well, in the front of my automobile I do not have any floor mats at all. I have pieces of rubber that's been sewed into the carpet.

Q. Does that have an appearance of being like a mat? A. Yes, it does.

Q. You remember when you were arrested, I am sure, don't you? A. Yes, I do.

Q. Do you remember when the police officers were interviewing you in Platte City? A. Definitely do.

Q. Did they read you your Miranda rights? A. Yes, they did.

Q. You remember when Officer Luther testified the other day, do you remember he said that you understood your rights, but you wouldn't sign the form which is a written form that you understood your rights; do you remember him testifying to that? A. Yes, I do remember what Mr. Luther said.

Q. Why wouldn't you sign that at that point? A. Because I did not understand my rights at that time. And my mother told me not to sign anything at all.

[1837] Q. You also heard him state that later that you said that if he would let you talk to your father,

you would tell him how Julie was killed; did you make that statement? A. No, I did not.

Q. Did you ask for a lawyer while this was all going on? A. I did not ask for no lawyer because I had not done anything.

Q. You didn't want to see your father? A. Yes, I did.

Mr. Brown: May I have just a moment, Your Honor.

Q. [By Mr. Brown] You remember when your tooth impressions were taken at Menorah Hospital? A. Yes, I do.

Q. The day before they were taken, a couple officers talked to you about it, didn't they? A. Yes, they did.

Q. When they were talking to you about taking your tooth impressions, did they say anything about this bite mark? A. Yes, they did.

Q. What did they tell you about the bite mark? A. They said Julie had been bitten on the breast.

Q. So as of the 15th or 16th of September you had that knowledge, didn't you? A. Yes, I did.

Q. You didn't hesitate to give them your tooth impressions, did you? [1838] A. No, I did not.

Q. They took a set that day and then came back later and took a whole bunch of them, didn't they? A. Yes, they did.

Q. You didn't hesitate at all to give them to them? A. I told them I did not have anything to hide because I did not kill Julie Wittmeyer.

Q. You didn't ask for any advice from a lawyer to see if they could legally do that?

Mr. Allred: I object to the leading form of the question.

The Court: Sustained. Don't lead your witness. Reframe your question.

Q. [By Mr. Brown] Did you seek advice of a lawyer before giving those tooth marks? A. No, I did not.

Mr. Allred: I object, leading form of the question.

The Court: Sustained.

Q. [By Mr. Brown] I'll ask you now, Mark, jam out: Did you kill Julie Wittmeyer? A. No, I did not kill Julie Wittmeyer.

Mr. Brown: That's my direct examination, Your Honor.

The Court: Cross-examination.

Cross-Examination

By Mr. Allred:

[1839] Q. Mark, you say you—you said you didn't understand what these officers read to you? A. I told them I understood, but I did not understand of the rights they had read to me.

Q. Which part did you not understand? A. The right to remain silent.

Q. That was the first thing that was told to you on your rights, that you had a right to remain silent? A. Yes. Yes, I did have the right, but I did not understand why they was questioning me.

Q. Did you understand—they told you that anything that you say could be used in a court of law against you? A. Yes.

Q. You understood that? A. Yes. In a way.

Q. Then you went ahead and talked to the police officers? A. Yes, I did.

Q. When you talked to the police officers, did you tell them the truth? A. Yes, I told them the truth.

Q. All right. Everything you said to the police officers in these statements, various statements, was the truth? A. Yes, it was.

Q. All right. Starting with—when your mother came to get you, did you get in an argument with her? [1840] A. No, sir, we did not.

Q. You didn't argue with her at all? A. No, sir, we did not.

Q. Did you want her to take you to the drive-in theater? A. Yes, I did want her to take me.

Q. Did you ask her to? A. Yes, I did.

Q. Did she take you to the drive-in theater? A. No, she did not.

Q. What happened? How did you go to the drive-in theater? A. Drove my own car.

Q. Do you recall when Officers Mills and Luther interrogated you on October 1st, 1977, the day of your arrest? A. Yes, I do.

Q. Did you tell them the truth? A. Yes, I did.

Q. Did you make the statement that, Mark said his mother wanted to drive him to the drive-in, but he refused to let her do this and told her the only way he he would go to work was if she would take him home and get his own car? A. No. I did not make such statement.

Q. You did not make such statement? A. No.

Q. If that statement is in this record, it's a lie by the police officers? [1841] A. Yes, it is.

Q. If the police officers wanted to lie about the thing, couldn't they have written out a confession? A. I do not understand your question.

Q. If the police officers wanted to lie in their reports, they could have just written out a confession for you couldn't they? A. No.

Q. What would keep them from it? Integrity? A. Just Mr. Luther and Mr. Mills did lie about it.

Q. I said, if they wanted to lie about it, they could write out the whole confession for you exactly how you killed Julie? A. They could have.

Q. They didn't though, did they? A. No, they did not.

Q. Now, having said it that way, do you recall when you got home, were your brother and sister there? A. No, they were not.

Q. Do you remember making this statement to Officer Luther: Mark was asked what time he arrived home and he said he did not have a watch and had to guess at the time and estimated it to be just a few minutes past 4:00 p.m. because his younger brother and sister were watching Gilligan's Island on TV when he entered the house. A. That is not true.

[1842] Q. That's not true either? A. No, sir.

Q. Again the officers lied? A. Yes.

Q. Did you ask the police officers what time Gilligan's Island came on—and did they ask you what time Gilligan's Island came on and you said "Four o'clock"? A. They asked me what time Gilligan's Island came on and I told them I thought around four o'clock.

Q. Thought it was about 4:00. Do you now know it came on at 4:30? A. Yes, I do.

Q. When did you learn that? A. When I was at the hospital.

Q. So when you got home, it was after Gilligan's Island was already on, it was after 4:30? A. At the day that Gilligan's Island came on it was beginning a time change and I told the officers that at the time I was home that Gilligan's Island was on.

Q. You told them—you did tell them Gilligan's Island was on; right? A. Yes, I did.

Q. And so what you're telling me is it had changed to 4:30; right? A. Yes.

[1843] Q. And so it was at least after 4:30 when you got home? A. No, it was not.

Q. I thought you said Gilligan's Island was on and it changed to 4:30. A. Gilligan's Island was on at 4:30 and now it's changed to four o'clock.

Q. When did it change to 4:00? A. On September 2nd.

Q. On that very day it changed? A. I do believe.

Q. Did you ever tell the police officers when you got home that your brother and sister were there and they were watching cartoons? A. No, I did not.

Q. Did the police officers in the Luther interrogation, that is Luther and Mills, when they interrogated you right after arrest, you know? A. Yes, sir.

Q. Did—Mark was asked what it would take to tell us how—Mark was then asked what it would take to get him to tell us how his teeth impression got on Julie's breast and how Julie was killed—right; did they ask you that? A. They did ask me that.

Q. Your answer was: "Mark then replied 'If my Dad tells me to tell you, I'll tell you everything and how Julie was killed.'" [1844] A. I did not make that statement. I told them I would like to talk to my Dad because I had not done anything.

Q. Is that statement a lie in the report, too? A. Yes, it is.

Q. Did you ever tell the police officers that you left the theater at Riverside Drive-In Theater sometime between 3:00 and 4:00 and you weren't sure what time it was?

A. At that time I was scared and everything and I told them I had left between 3:00 and 4:00.

Q. Now you tell us differently? A. Yes. After I have had time to think about it, I do know what time I left.

Q. On the first of October, you had had a month to think about it since Julie was killed on September 2nd; right? A. Yes, I did.

Q. You told them you didn't know what time, but it was sometime between 3:00 and 4:00? A. Yes. I was scared and they were interrogating me and pushing me. I told—[interrupted]

Q. Pushing you, you said? A. Yes. Mr. Luther was pointing his finger in my chest.

Q. I see. When you gave them the answer you gave them a truthful answer, didn't you? A. I told them to the best of my knowledge I did leave between 3:00 and 4:00.

[1845] Q. Could have been any earlier than three o'clock? A. No, sir, it could not.

Q. You didn't sign out your time that day, did you? A. No. My time—I could have signed out and I could not have. I do not know.

Q. Did you tell the officers you signed out at 3:45? A. I told them it was around 3:45 when I should have left.

Q. When you what? A. Should have left.

Q. You didn't know what time you did leave? A. I left—I do know what time I did leave.

Q. You do now? A. Yes.

Q. But you thought it was between 3:00 and 4:00 then? A. At what time?

Q. When the officers interviewed you on October 1st. A. Yes, I did.

Q. All right. Now, do you recall riding over to Lexington, Missouri, too, with Officer Deister and Dayringer?

Mr. Brown: Come up, please.

[The following proceedings were held at the bench OUT OF THE HEARING of the jury:]

Mr. Brown: Your Honor, I am going to object to him going into anything that has to do with any statement taken after October 1st. Court has sustained my Motion to [1846] Suppress filed by the defendant.

Mr. Allred: Opens it up. He made a complete denial of the crime. The Harris case opens it up for impeachment purposes.

The Court: Objection overruled. Your objection will run to any of this testimony. I'll show it running to all of it.

Mr. Brown: He can't go into every matter.

The Court: I'll hear your objection if you believe there is one. The general objection to those matters, I'll preserve it for you.

[The following proceedings were held WITHIN THE HEARING of the jury:]

Q. [By Mr. Allred] Do you remember taking a ride to Lexington, Missouri, with Officer Deister and Corporal Dayringer? A. What day is that?

Q. October 2nd, 1977. A. Yes, I do.

Q. Next day after your arrest? A. Would be October 3rd.

Q. Where did they take you to? A. Took me to Lexington jail.

Q. All right. When—as you drove through that car, did you talk—while you were in the car, did you talk to anybody about the crime? [1847] A. No, I did not.

Q. You did not say a word about it at all? A. Yes, I did at one time.

Q. What did you say? A. I told Mr. Deister that I would complete my verbal statement.

Q. That you wouldn't what? A. That I would complete my verbal statement.

Q. That you would complete your verbal statement? That is the verbal statement that you started on the day before, October 1? A. Yes, it was.

Q. Did you tell Officer Deister that when you got to your house you shut off your engine, went inside the house, the approximate time at this point was 4:15; upon entering the house that your parents were not at home, but your brother and sister were there watching television, Channel 41 on television; and went on to say that some cartoons were playing? A. That is not the statement I made.

Q. Did you not make that statement? A. No.

Q. The officer lied again? A. Yes, he did.

Q. Now, did you tell Officer Deister, as you completed your statement, that you stated that you picked up the phone and [1848] tried to telephone Riverside in—and in an attempt to contact your parents, but you received a busy signal; did you tell them that? A. Yes, I did.

Q. At which time you slammed the telephone receiver down so hard that it broke the telephone? A. Yes.

Q. You told them that? A. Yes, I did.

Q. You didn't tell them about any three times to try to call Riverside? A. They asked if I tried to call Riverside Drive-In. I said yes.

Q. You didn't tell them about any three times? A. No, I did not.

Q. You got a busy sound, didn't you? A. Yes, I did.

Q. If you got a busy sound, there wouldn't be any telephone call on that bill. May I have that bill, please?

There wouldn't be any toll call. It's not marked.

Mr. Brown: It's on the third page.

Q. [By Mr. Allred] There is a call on 9-2—I'm sorry, yeah, 9-2 to Parkville, Missouri, 816-741-0811. What number is that? A. That is the number of the Riverside Drive-In.

[1849] Q. That's the call that your brother made to tell you to get home because your parents were looking for you? A. No, that is not.

Q. Or they were on the way to the drive-in to get you? A. No, that's not. I made that phone call.

Q. If it was busy, there wouldn't be any charge on here, would they? A. I did get a connection.

Q. That doesn't answer my question. A. Yes, it was busy two times.

Q. Wouldn't be any charge, would it? A. No.

Q. Do you remember during that ride with Detective Deister, that he asked you how much gasoline you had in your car when you left the Riverside Inn? A. Yes, I do.

Q. What was that? A. That he stated that he asked me how much gas I had.

Q. What did you answer? A. One-quarter of a tank.

Q. Didn't you tell your mother you had a full tank of gasoline? A. No, I did not.

Q. You didn't tell your mother that when you were arguing with her about taking you home to your car? A. I told her I had enough gas to get to work and back.

[1850] Q. Do you remember when you were being interrogated by Officers Deister and Bell on the first, October 1st, not October 2nd when you were going to Lexington; right? A. Yes, I do.

Q. Did you tell them the truth at that time? A. Yes, I did.

Q. "Mark then stated since his car had a full tank of gasoline in it, they both agreed Mrs. Sager would drive Mark home, give his vehicle a jump-start, then he would drive on to work himself." Was that accurate? A. No, it was not.

Q. You lied to the officers? A. No, I did not.

Q. Did the officers lie about putting that down? A. Yes, they did.

Q. You didn't say that? A. No, I did not.

Q. Do you remember being interrogated again on the 2nd by Deister and Dayringer on the way up to Lexington? A. Yes, I do.

Q. Do you remember them asking you what time it was that Danny Wheeldon appeared in your house? A. Yes, I do.

Q. Danny Wheeldon, Wheeldon, I am sorry. [1851] A. Yes, I do.

Q. Do you remember talking to them about that? A. Yes.

Q. What time did you tell them Wheeldon got there? A. I can't recall, but Danny and Greg did arrive somewhere around twenty-five to, 4:30, somewhere around there.

Q. Do you remember telling them he arrived at approximately 4:40 p.m.? A. No, I did not.

Q. You didn't say that? A. No.

Q. That was a lie then the police officers wrote in there? A. Yes it was.

Q. Do you carry a knife with you? A. At this time—[interrupted]

Mr. Brown: Just a moment. I object. Come up.

[The following proceedings were held at the bench OUT OF THE HEARING of the jury:]

Mr. Brown: On this basis I am going to object, that's not in the purview of the direct examination. There's no evidence in here at all from any standpoint that he carries a knife.

Mr. Allred: I have a case I'll show the Court that once he states "I didn't do it", it opens up the entire scope of the crime.

[1852] [The following proceedings were held WITHIN THE HEARING of the jury:]

The Court: The objection will be overruled. Let's proceed.

Q. [By Mr. Allred] Do you remember talking to Officer Deister as you rode down there to Lexington? A. Yes, I do.

Q. I haven't finished my question yet. Do you remember telling him, him asking you when was the last time you were on HH Highway? A. Yes, I do.

Q. Do you remember giving this answer: "The last day was the Friday Julie was killed when on the school bus, the bus went down to Rowell's residence on the Interurban, turned around, went up to HH Highway, then west to Bethel Road, then south on Bethel Road to 92 Highway"? A. That's not correct statement I made. I did tell them I was on HH, but I had not been towards Julie's house. I was on HH with the school bus.

Q. With the school bus. Did you follow the school bus around? A. I was in the school bus.

Q. You was on it. I thought your mother took you home. A. This was in the morning.

Q. This was in the morning going to school. Did you ever make the statement to Mrs. Riegelman that you were the last person [1853] to see Julie alive? A. I

did not, because Mrs. Riegelman had her hands in my mouth and I couldn't have talked.

Q. So Mrs. Riegelman lied, too? A. Yes, she did.

Q. Did you tell Mrs. Riegelman that you had an air-tight alibi? A. I told Mrs. Riegelman I had an alibi.

Q. You could talk well enough to tell her that? A. When we was going into the office, into the chair in the dentist's office.

Q. You told her that? A. Yes.

Q. Did she ask you—did you make remark that you were the last one to see Julie alive? A. No, I did not because I did not kill Julie Wittmeyer.

Q. Okay. Do you remember Terry Deister asking you, Officer Deister as you rode to Lexington: "Is there any reason why the Metro Squad would find blood on the inside of your vehicle?" And you answered: "You might find some blood in the right-rear floorboard area. When I was working at Pioneer North Restaurant, I took some old liver from the restaurant to use for fish bait. I forgot to remove it from my car and it leaked all over my floor mat and it even started getting maggots on the underside of it." [1854] A. Yes, I did make that statement.

Q. Did Deister ask you if there is any reason they might find blood on the front seat? A. Yes, he did.

Q. What did you tell him? A. I told him at one time I had a bloody nose one night and he might find some blood on the front seat.

Q. So both of those things would have explained, if the police had found blood in your car, would explain why there was blood there, wouldn't it?

Mr. Brown: I object. Improper cross.

The Court: That objection will be sustained as to the question being argumentative in nature. Proceed.

Q. [By Mr. Allred] Are you aware of the fact that the detectives told you they didn't find any blood except two little drops? A. Detectives did not tell me.

Q. You never heard that before? A. No, I have not.

Q. Until just now? A. Until just now when the Regional Crime Lab testified.

Q. Do you now remember October 5th? This is a different date. We have October 1, October 2nd and now October 5th.

Mr. Brown: Would you come to the bench, please.

[The following proceedings were held at the bench OUT OF THE [1855] HEARING of the jury:]

Mr. Brown: Your Honor, I'd like to have the Court note I am going to object to the entire cross-examination in this line on any matters that took place on October 5th because, again, that was the matter of the Motion to Suppress and he should not be—you have ruled in my favor and he shouldn't be permitted to go into it. And I'd like to point out to the Court yesterday when we were talking about some statements and I asked the Reporter to put a rubber band in there, you said straight out that these statements had been suppressed. If they're suppressed, they're suppressed. They shouldn't be allowed.

The Court: You'll find my ruling was they're suppressed insofar as the State's case in chief.

Mr. Brown: That's what you said before, but yesterday—[interrupted]

The Court: I don't know what I said yesterday, but the docket sheet is my ruling. That's what I said. Your objection is noted and overruled.

[The following proceedings were held WITHIN THE HEARING of the jury:]

Q. [By Mr. Allred] You talked about a statement of October 1st; right? A. Yes.

Q. With Deister—I mean, with Luther and Mills? [1856] A. Yes.

Q. Then you talked about another statement on October 1st that continued after Luther and Mills stopped, and that was Deister that took that statement; right? A. Yes, Deister and another officer.

Q. Now you have talked about a statement made on October 2nd, haven't you? A. Yes, I have.

Q. Let's talk about one made on October 5th, 1977. All right? A. Okay.

Q. Do you remember Fred Mills and Luther coming up to the Lexington jail to talk to you? A. Yes, I do.

Q. Did you tell them the truth when they talked to you? A. Yes, I did.

Q. "Mark then told us—" What time did you tell them you left the theater? This is five days—three days after your arrest, now, four days. A. I can't recall the exact, but I told them it was in between around 3:30 or so.

Q. "Mark then told us he left the drive-in sometime between 3:00 and 4:00 p.m." Did you say that? A. No, I did not.

Q. You didn't. Is that a lie by the officers? A. Yes, it is.

[1857] Q. And drove up 129—I-29 to 112th street where you drove around Sambo's Restaurant looking for Paula's sister but did not find her? A. No. I did not state that.

Q. You didn't say that? That's a lie by the officers? A. Yes. I drove to Holiday Inn to see if Paula was in the parking lot.

Q. That's what you said in your direct testimony. A. Yes, it is.

Q. But on October 5, you said the statement that you went to Sambo's to look for Paula's sister was not made by you? A. That is a lie.

Q. Then did you tell them about whether or not your brother and sister were home when you got home? A. They asked me if any brother and sister was home at the time I was home and I told them when I got home my brother was, and then later on that afternoon my sister did come home.

Q. All right. Did you tell them, you didn't make this statement: "When he arrived home his brother and sister were watching Gilligan's Island on TV on Channel 41"? A. They asked me who was home at the time I was home, and I stated my brother and sister was home at the time I was home.

Q. And they were watching Gilligan's Island on TV? [1858] A. I told them, yes.

Q. Gilligan's Island started at 4:30? A. Yes.

Q. And it goes to five o'clock? A. On September 2nd, yes.

Q. So you got home at least after 4:30? A. No, sir. I told them that at the time I was home that Gilligan's Island was on between ten-after-four and five o'clock when I left.

Q. You just told me it started at 4:30. A. At that time, yes, it did.

Q. That's right. When you got home it was on? A. I did not state that.

Q. That's a lie? A. Yes, it is.

Q. Did you ask the police officer, that is Fred Mills and Mr. Luther talking to you over to the Lexington Jail, did you ask them what physical evidence they had against you? A. Yes, I did.

Q. What did they reply? A. They would not tell me.

Q. "We told him we had searched his house with a search warrant for the knife that was used to kill Julie Wittmeyer." A. They did not state that.

Q. They didn't say that? That's a lie? Then you said to them: [1859] "You didn't find it, did you?" Right; did you make that statement? A. No, sir, I did not.

Q. That's a lie, too. "We told him we found three knives and that we were checking them out. Mark then started grinning and laughed and said 'You're wasting your time and if you say that you got that knife that was used to kill her, you're lying to me because I know you don't have the right knife.'" A. I did not make that statement.

Q. That's a lie, too? A. Yes, it is.

Q. Do you remember the officers then telling you they didn't know what you meant by they didn't have the right knife; did they tell you that? A. Beg my pardon?

Q. "We then asked Mark how he could be so sure that they didn't have the right knife." Did they ask you that? A. No, sir, they did not.

Q. Is that a lie? A. Yes, it is.

Q. "He then started laughing again and said 'I know you will never find the knife that was used to kill her.'" You say that? A. No, sir, I did not.

[1860] Q. "We then asked Mark where he put the knife and he just smiled and said 'I know you will never find it.'" A. I did not make no statement.

Q. "When we asked Mark if he threw it in the Platte River", which was flooding at that time, by the way— "Platte River, and he continued to smile and said 'I told you I know that you will never find the knife.'" A. I did not make that statement.

Q. When's the first time you found out you were going to be taken to the hospital by your mother and father? A. When was the first time?

Q. Yes. A. On September 2nd.

Q. What time was that? A. When Paula called.

Q. When Paula called? A. Yes.

Q. Didn't you go to the hospital? A. Yes, I did.

Q. Were you scared of the hospital? A. Well, I don't think anybody likes hospitals. I was kind of scared, yes.

Q. Did you get angry about the fact that your mother and father were asking you to have treatment? A. No.

[1861] Q. Did you try to choke your mother; did you choke your mother that morning?

Mr. Brown: Just a minute. I object to that.

The Court: That objection will be sustained as to that particular question. Let's proceed.

Mr. Allred: As to form?

The Court: Objection will be sustained. Let's proceed.

Q. [By Mr. Allred] Do you recall the officers— again this is the officers who came over to interview you on the 5th of October; okay? A. Yes.

Q. You are oriented as to the place we are? A. Yes. Lexington Jail, we're at the Lexington Jail.

Q. Right, October 5, 1977. A. Yes.

Q. And did you tell the police, do you recall the police asking you if you really thought you could forget something as terrible as this killing was? A. Repeat the question.

Q. Do you recall telling the police, telling you could you really forget something as terrible as killing someone? A. No, I did not make that statement.

Q. Did not. Did you tell them one time you choked your mother and you knew it was wrong, but were able to put it out of your mind? [1862] A. No, I did not state that.

Q. That's a lie, too. Did you ask the police officers if they would try to help you get into the State Hospital? A. Did I ask them?

Q. Yes. A. No, I did not.

Q. Did you tell the police that you would rather not go to prison for murder because you thought they—you'd be killed by the other inmates? A. No, I did not.

Q. Because you were sure other inmates wouldn't like anyone who killed a young girl? A. That is what they told me. They said people down at the prison would not like what I—what they had done, and I told them that that just to leave me alone.

Q. Just to leave you alone.

Then did they ask you—I mean, then did you ask them if they would try to help you get into the State Hospital instead of the penitentiary? A. No.

Q. To get some treatment and some help? A. No, sir.

Q. Okay. That you would rather do that than go to prison; you didn't say that? A. No, sir, I did not.

[1863] Q. Did they tell you this would have to be something worked out between your attorney and the Court and then did you say "I am sure they'll convict me if I

have to go to trial and I would just as soon go to the State Hospital now"? Did you make that statement? A. No, sir. Mr. Luther and Mr. Mills did not ask me any questions at all.

Mr. Allred: We have no further questions.

The Court: Redirect.

Redirect Examination

By Mr. Brown:

Q. Yes, Mark. These statements that you have been thoroughly cross-examined about, was there anybody there with you except two big policemen? A. No, sir, there was not.

Q. Your mother and dad wasn't there with you? A. No, sir.

Q. I wasn't there with you? A. No, sir.

Q. Then after they did all these questions, did they come back with a typed-up summary of what they thought you said and put it down to you and let you read it? A. No, sir, they did not.

Q. Had they done that, you would have had an opportunity to do something about it, wouldn't you? [1864] A. Yes, I would have.

Mr. Allred: I object to the leading question.

The Court: Sustained. Don't lead your witness.

Mr. Allred: Move to strike the answer, ask the jury to disregard it.

Q. [By Mr. Brown] What would you have done if someone had showed you a summary of what they thought you said on that day, how would you have reacted? A. If it was the truth and I would have reacted that it was the truth, but if it was not, then I would have refused to sign it.

Q. You didn't have any opportunity at all to do that? A. No, sir, I did not.

Q. Do you recall an interview that—with a policeman Jesse McLendon and Larry Drewhurt [Phonetic Spelling], on September 12, 1977, at Menorah Hospital when your mother was present with you? A. Yes, I do.

Q. What did you tell those officers about your activities on September 2nd? A. I told them everything that happened that day.

Q. Then if they put in their report "Mark told the officers he left school around 12:15 when his mother picked him up," that's true? A. Yes.

[1865] Q. "Mark then went home, jump-started his car and went to work in Riverside Drive-In where he was a maintenance worker." That was true? A. Yes.

Mr. Allred: I object to the leading form of these questions.

The Court: Objection will be sustained. Let's proceed.

Q. [By Mr. Brown] Then what time did you tell them that you got off from work that day? A. I told them around about 3:45.

Q. What about time, you tell them about what time you got home that day? A. Yes, I did. I told them around about a quarter-after-five—four.

Q. What time did you tell them that your mom and dad arrived to take you to the hospital? A. About ten-till-five.

Mr. Brown: I have no more redirect.

The Court: Recross

Recross-Examination

By Mr. Allred:

Q. Taking you back again to September 12th, 1977, that's still another day, isn't it? A. Yes. At Menorah Hospital.

Q. Your memory was fresher then about these statements than it [1866] is now, wasn't it? A. Yes.

Q. And that your memory was fresher about what you told the officers then than it is now; right? A. Yes.

Q. Did you tell the officers that—let me see, McLendon on 9-12-77, did you tell Officer McLendon that you left the drive-in about 5:30—I'm sorry, 5:30.

Mr. Brown: Would you read that correctly? 1530.

Q. [By Mr. Allred] 1530 means 3:30.

The Court: Gentlemen, let's proceed.

Q. [By Mr. Allred] Went home arriving there about 4:15? A. Yes, I did.

Mr. Brown: Just a moment. He's misreading from this statement. You're supposed to be reading from the statement. It's 1600, four o'clock.

Q. [By Mr. Allred] What did you just now tell your lawyer what time you got home? A. I said around about ten-after-four, fifteen-after-four.

Q. Yes. So it wasn't four o'clock, then, was it? A. They asked me to give a round numbers and I said around about four o'clock.

Q. They asked you to round the numbers off instead of being specific? A. I told them I couldn't be specific because I did not have a [1867] watch.

Q. The truth of the matter is you're guessing about all these times, aren't you? A. I am going by the factors of time and everything, yes.

Mr. Allred: I have no further questions.

The Court: Redirect.

Mr. Brown: Nothing further.

The Court: Step down.

Call your next witness.

Mr. Brown: Call Detective Luther.

Mr. Allred: With leave of the Court, may I recall him for one question, the defendant?

Mr. Brown: No, sir.

I am sorry, Your Honor, that is not my prerogative. My prerogative is to object, and I do object.

Mr. Allred: Ask leave of the Court to recall the defendant.

Mr. Brown: I apologize to the Court.

[The following proceedings were held at the bench OUT OF THE HEARING of the jury:]

The Court: What is the question?

Mr. Allred: The question is: Did you have a wristwatch on?

The Court: I'll permit that inquiry.

[The following proceedings were held WITHIN THE HEARING of the [1868] jury:]

Mr. Brown: Take the stand again, Mark.

Further Recross-Examination

By Mr. Allred:

Q. Mark, did you have a wristwatch on this day? A. Today?

Q. Did you have a wristwatch on the days when you were talking to the police officers? A. No, I did not.

Q. Did you have a wristwatch on September 2, 1977? A. No, I did not.

The Court: Any redirect?

Mr. Brown: No, Your Honor.

The Court: Step down.

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